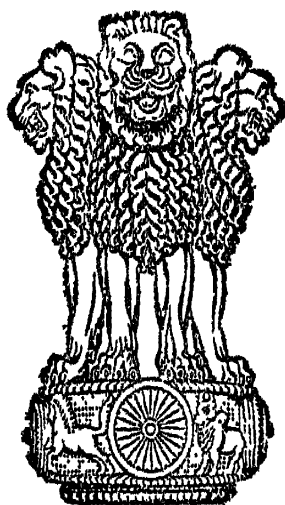


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SELECTED ARTICLES
ON
THE CONFLICT OF LAWS

BY
ERNEST G. LORENZEN

*Published for
the Yale Law School Association*

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FOREWORD

THE publication of this volume is another proof of the dynamic interest taken by the officers and members of the Yale Law School Association in the affairs of the school, for it was only through the initiative of this Association and its whole-hearted financial support that the articles could have appeared in book form at this time. All of the articles selected, with the exception of two, were written while I was a member of the Yale University School of Law. Within the space allotted, it was not possible to include all of my articles on the Conflict of Laws; it seemed fitting, therefore, to omit all articles on the Conflict of Laws of foreign countries and to confine the volume strictly to a discussion of Anglo-American problems. While the articles do not cover the entire scope of the Conflict of Laws, they will be found to deal extensively with many of the general problems, and with mooted questions in particular fields. No attempt has been made to annotate the articles with the view of bringing them up to date. Only in one or two instances did it seem desirable to alter the original text because of subsequent developments.

I wish herewith to express to the members of the Yale Law Faculty—and in the field of the Conflict of Laws especially to Wesley Newcomb Hohfeld and Walter Wheeler Cook—my deep obligation for the inspiration they have been to me, and to my friends of the Yale Law School Association my sincerest appreciation of the honor shown me by sponsoring and financing the publication of this volume. I should like to express my grateful acknowledgment also to the *Columbia Law Review*, *Harvard Law Review*, *Illinois Law Review*, *Law Quarterly Review*, *Michigan Law Review*, and *Yale Law Journal* for their courtesy in permitting the republication of the articles contained herein.

ERNEST G. LORENZEN

1. TERRITORIALITY, PUBLIC POLICY AND THE CONFLICT OF LAWS*

DICEY calls attention to the fact that there are two great schools of writers on the Conflict of Laws—the theoretical and the positive. The theoretical writers attempt to deduce the rules of the Conflict of Laws from some *a priori* principle. Starting with some general principle, they try to derive therefrom a body of consistent rules. The positive method, on the other hand, studies the actual rules in force and attempts to reduce them to systematic order. The theoretical method is adopted by the great majority of continental writers, whereas the positive method is preëminently that of the English and American writers. Concerning the advantages and disadvantages of the theoretical method Dicey says:¹

“The advantages of the theoretical mode of treatment, when employed by a man of genius, such as Savigny, are in danger of being underrated by English lawyers, to whose whole conception of law it is at bottom opposed. It is therefore a duty to bring these merits into prominence. The two great merits of the method are, first, that it keeps before the minds of students the agreement between the different countries of Europe as to the principles to be adopted for the choice of law, and next that it directs notice to the consideration which English lawyers are apt to forget; that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice, and is not a matter in any way of mere fancy or precedent. Whether, for example, the legal effect of a given transaction ought to be tested by the *lex actus*, the *lex domicilii*, or the *lex fori*, is a matter admitting of discussion, and which ought to be discussed on intelligible grounds of principle. . . .

“The true charge against the theoretical method is that it leads the writers who adopt it to treat as being law what they think ought to be law, and to lay down for the guidance of the courts of every country rules which are not recognized as law in any country whatever. ‘The jurists of continental Europe,’ writes Story, ‘have, with uncommon skill and acuteness, endeavored to collect principles which ought to regulate this subject among all nations. But it is very questionable whether their success has been at all proportionate to their labour, and whether their principles, if universally adopted, would be found either convenient or desirable, or even just, under all circumstances.’ This remark exactly hits the weak point of a method which rests on

* (1924) 33 YALE LAW JOURNAL 736.

1. Dicey, *Conflict of Laws* (3d ed. 1922) 18-19.

the assumption, common to most German jurists, but hardly to be admitted by an English lawyer, that there exist certain self-evident principles of right whence can be deduced a system of legal rules, the rightness of which will necessarily approve itself to all competent judges."

Anglo-American writers, being positivists, attempt to state only the rules laid down by the English and American courts and they do not claim universal validity for these rules. English writers in particular have been careful not to indulge in any generalizations not warranted by the decisions. There are certain statements in Story, on the other hand, which might suggest that the Anglo-American rules of the Conflict of Laws have been established as the direct result of the principle of the territoriality of law.

Says Story:

"Before entering upon any examination of the various heads, which a treatise upon the Conflict of Laws will naturally embrace, it seems necessary to advert to a few general maxims or axioms which constitute the basis upon which all reasonings on the subject must necessarily rest; and without the express or tacit admission of which it will be found impossible to arrive at any principles to govern the conduct of nations, or to regulate the due administration of justice." ²

"The first and most important general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it." ³

"Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others. This is a natural consequence of the first proposition; for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its territory." ⁴

"Upon this rule there is often ingrafted an exception of some importance to be rightfully understood. It is that although the laws of a nation have no direct binding force or effect, except upon persons within its own territories, yet that every nation has a right to bind its own subjects by its own laws in every other place." ⁵

2. Story, *Conflict of Laws* (8th ed. 1888) sec. 17.

3. *Ibid.* sec. 18.

4. *Ibid.* sec. 20.

5. *Ibid.* sec. 21.

Compared with the continental systems, it is manifest that the Anglo-American rules of the Conflict of Laws give a much wider range to the application of the law of the *situs* as regards transactions affecting real property.⁶ The powers of executors and administrators, guardians and trustees in bankruptcy, according to Anglo-American law, do not extend on principle beyond the limits of the state in which they were appointed, whereas the contrary is true on the continent.⁷ The jurisdiction of courts in personal causes of action is predicated upon service of process within the state.⁸ In these and other respects the Anglo-American system of the Conflict of Laws may be characterized as more territorial in its nature than the continental. So far as Story's maxims express only this general attitude of the Anglo-American law no fault can be found with them. They cannot be approved, however, in so far as they suggest that the rules of the Conflict of Laws adopted by the English and American courts follow as a matter of logical and necessary deduction from the principle of the territoriality of law.

Directing the attention to the particular form in which the maxims are expressed by Story and the immediate consequences drawn therefrom, one cannot help but be impressed by the vagueness of their character. What does Story mean when he says that as a direct consequence of the exclusive sovereignty and jurisdiction which a state possesses within its own territory its laws affect and bind directly all property within its territory, persons resident therein, and acts done therein?

As regards real estate Anglo-American courts have gone far in applying the law of the *situs*. Conveyances of land are accordingly held to be governed by that law, both as to "capacity," "form," and "essential validity." This rule had been applied not only by the courts of the state in which the land is situated (state A), but also by the courts of any other state in which the common law point of view exists. That the above rule is not a necessary one, resulting directly from the "exclusive sovereignty and jurisdiction" of state A is seen, however, from the fact that since the time Story wrote a good many legislatures have enacted that deeds to land within their state shall be deemed sufficiently executed if they satisfy the form requirements of the place of execution.⁹ This shows that state A

6. Concerning the continental law see Lorenzen, *Cases on the Conflict of Laws* (2d ed. 1924) 506, note; 507, note.

7. Lorenzen, *op. cit.* 903, note.

8. The continental and South American countries take a contrary view. Lorenzen, *op. cit.* 126-127, note.

9. See Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws* (1911) 20 YALE LAW JOURNAL, 427, 433-434. See also *In re De Nicols* [1900] 2 Ch. Div. 410, where it is sug-

can determine legal relations with reference to land lying with its territory by some other rule than the *lex rei sitae*. On the continent the law of the *situs* is not applied with reference to either "capacity" or "form."¹⁰

State A has, of course, no power to impose its own policy upon any other sovereign state. Only some supra-state authority could do this.

In its application to chattels, Story's first maxim does not give in the least an accurate picture of the rules of the Conflict of Laws prevailing at the time or now. The transfer of chattels was governed at the time Story wrote by the law of the *situs* neither as regards "capacity," "formalities," or "essential validity." Rights therein were governed as a rule by the law of the domicile of the owner. During the latter half of the last century a more controlling influence has been given by Anglo-American law to the law of the *situs* with respect to chattels than theretofore, but only where the transfer was *inter vivos*, and did not result from the operation of law.¹¹ The sovereign of the *situs* has declined also, on grounds of policy, to apply its local law in instances which cannot be explained on any theory of territoriality.¹² To say that the law of the *situs* has "exclusive sovereignty and jurisdiction" with respect to chattels is, therefore, only a vague and meaningless statement, which does not express the existing law on this subject.

Story next asserts that state A has "exclusive sovereignty and jurisdiction" over all persons who are resident within it. It is difficult to see how this is the direct consequence of the "exclusive sovereignty and jurisdiction" which state A possesses within its territory. One would expect from such exclusive territorial jurisdiction that state A would have power with respect to all persons physically within the state, and this is the actual law of England and the United States as regards the jurisdiction of courts in personal causes of action, service of process within state A on any person found within the state having always been deemed sufficient by Anglo-American jurists. It is suggested that the law of matrimonial domicile may control the rights of husband and wife in English realty if the parties were domiciled at the time of their marriage in a state in which the community of property régime prevailed. Compare Dicey, *op. cit.* 555.

10. *Supra* note 6.

11. See *Cammell v. Sewell* (1860, Exch. Ch.) 5 Hurl. & N. 728. Where the passing of "title" results directly from the operation of law, the *lex domicilii* is generally held to control. *De Nicols v. Curlier* [1900, H. L.] A. C. 21 (matrimonial property); *Saul v. His Creditors* (1827, La.) 5 Mart. (N. S.) 569 (matrimonial property); *Ennis v. Smith* (1852, U. S.) 14 How. 400 (intestate succession).

12. See *Wray Bros. v. White Auto Co.* (1922) 155 Ark. 153, 244 S. W. 18 (registration of chattel mortgage).

courts.¹³ When Story made the above statement he evidently had in mind what is often spoken of as "*status*." But why should the law of the residence or domicile of a person govern in this respect rather than some other law? No theory based upon the territoriality of law can give an answer to this question, for to say that domiciled persons are constructively within the territory is to make use of a fiction which confuses "territorial" and "personal" jurisdiction. Since the time Story wrote many of the continental countries, as well as Brazil, Japan, etc., have accepted the law of nationality in this regard.¹⁴ Whether the law of domicile, the law of nationality or some other law is adopted for the solution of the problems of the Conflict of Laws involving "*status*," depends again upon the policy of state A and cannot be derived from any theory of territoriality.

Another direct consequence of his first maxim, according to Story, is that the laws of every state affect and bind directly all contracts made and acts done within the state. This statement can be true only so far as the courts of state A are concerned, for state A has no power to prescribe the Conflict of Laws rules for any other state. The application of its own local rules to contracts made within the state or wrongful acts done within its territory does not result, however, of necessity from the territoriality of law, but from the policy of state A.¹⁵ Story himself maintains that state A should apply the law of state B to a contract made in state A and to be performed in state B.¹⁶

Story's second maxim, which is said to be a corollary of the first, is that no state can by its laws directly affect or bind property out of its own territory or bind persons not resident therein. This maxim is even more misleading than the first. So far as B's courts are concerned, or the courts of another state, state A can of course not bind them in any way. It can lay down rules in the Conflict of Laws only for its own courts. But if A is a sovereign state, can it not provide that upon the death of the owner his property, including real estate in state B, shall pass to his heirs in accordance with the personal law of the deceased? Such a provision may be, of course, impolitic if the rule of the *situs* is not identical, but the question to be considered is merely whether state B has exclusive jurisdiction in the

13. *Pennoyer v. Neff* (1877) 95 U. S. 714; *Fisher v. Fielding* (1895) 67 Conn. 91, 34 Atl. 714. The continental law is opposed to this view. See Lorenzen, *op. cit. supra* note 6, at pp. 126-127, note.

14. Lorenzen, *op. cit. supra* note 6, at p. 9, note; Art. 3 of Japanese Law Concerning the Application of Laws in General, De Becker, *International Private Law of Japan* (1919) 75.

15. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE LAW JOURNAL, 457, 466 ff.

16. Story, *op. cit. supra* note 2, at p. 376.

sense that no other state can determine jural relations with respect to real property situated in state B in accordance with some local law other than that of the *situs*. It would seem manifest that, unless forbidden by some supra-state authority, a sovereign state, A, has the power, *so far as its own courts are concerned*, to determine all jural relations including those affecting real property in state B as its own sense of justice and policy may suggest.¹⁷ Indeed, the Italian Civil Code has a specific provision that all property, including real estate in foreign countries, shall devolve in case of death in accordance with the law of the state or country to which the deceased belonged by nationality.¹⁸ It is true, of course, that if the land were situated in this country the Italian provision would have no effect so far as our courts are concerned, but if the matter comes before an Italian court, the rights of the heirs would be determined *as if* the property were Italian property.

No state has so far attempted to say that the "title" to foreign realty shall be determined under all circumstances, so far as its courts are concerned, by a rule other than that of the *situs*. The Italian courts have had sufficient difficulty with their limited rule, as regards succession upon death, to be a warning to other countries. The fact that the physical *res* is in state B gives to state B in the nature of things the exclusive power to control the physical possession and enjoyment of the real property within its territory. State A has no such control and can acquire it only by making war upon B and gaining control over the physical *res*. State A can create a local "title" to land in state B, but it would be a "title" which might not be recognized by state B and without such recognition it would be worth little. Full ownership in land implies the possibility of the actual enjoyment of the physical *res*. On grounds of obvious expediency and common sense, it is held, therefore, practically universally that the "title" to land shall be determined in case of conflict with reference to the law of the *situs*. No such compelling grounds of convenience exist, however, so far as the law of the *situs* gives effect to a foreign rule contrary to its own local rule. On this principle courts of equity in England and the United States have declared rights with respect to foreign land in accordance with their own local rules and without ref-

17. See Cook, *op. cit. supra* note 15, at p. 457; (1918) 28 YALE LAW JOURNAL, 67; Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247, 265, 270 ff.

18. Art. 8 of the Preliminary Dispositions of the Italian Civil Code expressly provides that the national law of the decedent shall govern testamentary and intestate succession, including movables and immovables wherever situated. See also Cass. Turin, Dec. 20, 1905 (35 Clunet, 1910); but compare Cass. Palermo, Aug. 25, 1894 (Sirey, 1895, 4, 28, note).

erence to the rule of the *situs*.¹⁹ In these cases it is said that the "title" to the foreign law is affected only "indirectly," by virtue of the power of the court to compel the parties before them to execute the proper papers. In view, however, of the fact that the duty upon which the action of the court is predicated does not exist under the law of the *situs*, but is created by the law of the state where the action is brought, it is obvious that the law of the forum is allowed to change the legal relations with respect to foreign land. There is no supra-state rule that all rights with respect to foreign land must be determined under all circumstances in accordance with the law of the *situs*, and until such a rule is established each sovereign state must determine the matter in accordance with its own sense of what is convenient and just.²⁰ In this country complete freedom is not possessed, of course, by the individual states because of constitutional provisions.

So far as the second maxim relates to chattels it was inexact at the time Story wrote even as a matter of self-limitation on the part of state A. State A as an independent sovereign could, of course, determine, so far as A's courts are concerned, legal relations with respect to chattels in state B, in accordance with some other law than that of state B, and the courts actually determined such rights in accordance with the law of the owner's domicile.²¹

With respect to persons, Story's second maxim would not allow state A to bind "persons not resident therein," except citizens of state A. Why Story should regard the power of state A to bind persons domiciled in state A wherever they are as a consequence of the "exclusive sovereignty and jurisdiction" of state A within its territory, and its power over citizens as an exception to the principle of territoriality, it is difficult to see. So far as state A exercises jurisdiction over persons actually within another state, either because they are domiciled in state A, or because they are citizens of state A, it is clear that the jurisdiction is assumed because of a personal relationship between the party and state A. That state A may properly do so is generally, but not universally, admitted.²² Both grounds of

19. *Cranstown v. Johnston* (1796, Ch.) 3 Ves. 170; *Ex parte Pollard* (1840, Bankruptcy) Mont. & C. 239; *Burnley v. Stevenson* (1873) 24 Ohio St. 474.

20. International law does not limit the power of states in this respect. See Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, *supra* note 17, at pp. 265, 278 ff.

21. The notion that the law of the *situs* should control was introduced only in 1866 through the case of *Cammell v. Sewell*, *supra* note 11.

22. In favor of such jurisdiction see *Douglas v. Forrest* (1828, C. P.) 4 Bing. 686; *Henderson v. Staniford* (1870) 105 Mass. 504; *McDonald v.*

jurisdiction would appear to be exceptions to Story's theory of territoriality.

Although Story has omitted an express statement to that effect, it would seem to follow as a natural consequence from his first maxim that state A has no power to affect or bind contracts or other acts done in another state. But such a statement as this could mean only that as a matter of self-limitation state A would not exercise its power. If it saw fit state A could say that, so far as its courts are concerned, the local rule of state A should apply to all contracts wherever made and to all torts wherever committed. In fact some territorialists have advocated that the *lex fori* should always govern as regards foreign torts.²³ Story's statement is not true even from the standpoint of self-limitation on the part of state A. Story himself does not adhere to the view that the law of the state where a contract was entered into governs its validity, for he expressly holds that where the place of performance is in another state, the law of the latter controls.²⁴ And the English Court of Appeal has awarded damages for a tort, according to the rules of English law, although the wrongful act did not give rise to a private action in the state where it was committed, but only to a criminal prosecution.²⁵ The weight of Anglo-American²⁶ as well as of continental²⁷ authority is opposed also to the view that the law of the place where a contract is made determines the validity of such contract. All of this goes to show that the application of the law of the place of the contract or act is not firmly nor uniformly established even in Anglo-American law as a matter of self-limitation.

A very simple case will bring into evidence the inadequacy of Story's maxims as a guide to the solution of the problems of the Conflict of Laws. Suppose that the question relates to the validity of a deed to land situated in state A, the deed being executed and delivered in state B by X, a citizen of state C. According to Story's first maxim state A has exclusive power

Mabee (1917) 243 U. S. 90, 37 Sup. Ct. 343. *Contra: De la Montanya v. De la Montanya* (1896) 112 Calif. 101, 44 Pac. 345; *Raher v. Raher* (1911) 150 Iowa, 511, 129 N. W. 494.

23. Wächter, *Über die Kollision der Privatrechtsgesetze verschiedener Staaten* (1842) 25 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, 389 ff; Schmid, *Die Herrschaft der Gesetze und deren räumlichen und zeitlichen Grenzen* (1863) 76.

24. Story, *op. cit. supra* note 2, at p. 376.

25. *Machado v. Fontes* [1897] 2 Q. B. 231.

26. Beale, *What Law Governs the Validity of a Contract* (1909-10) 23 HARV. L. REV. 79, 194.

27. Lorenzen, *op. cit. supra* note 6, at p. 339, note; Lorenzen, *The Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE LAW JOURNAL, 565, 567.

over the property; state B has exclusive power over the execution of the deed, the act being done in state B; and state C, exclusive power over X. How are we to get out of the embarrassment? By applying the law of state A where the property is situated? But why should the laws of state B and of state C relinquish their power? Who is to be the umpire to choose from among the competing powers the one that is to control?

The only conclusion that can be reached from the foregoing discussion is that the rules of the Conflict of Laws are not based upon, nor are they derivable from, any uniform theory of territoriality.²⁸ In one class of cases reference is had to the law of the *situs* of the property; in others to the law of the place where the act in question occurred. In still other cases the rights are determined neither with reference to the *situs* of the property, nor with reference to the law of the state where the act occurred, but with reference to the law of domicile. Whether the rule of the one state or of the other shall be chosen is not prescribed by any supra-state authority, nor can it be deduced from any *a priori* principle.

In view of the foregoing it is a little surprising to find among the American courts and writers of to-day a tendency to accept the doctrine of the territoriality of law as the major premise for the solution of the problems of the Conflict of Laws. How else can be explained statements like the following:

"If the law of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity. The law of the place of performance can have no effect as law in another place, namely, the place where the parties act; for it is a fundamental doctrine of our law that 'the laws of every state affect and bind directly . . . all contracts made, and acts done within it. A state may therefore regulate . . . the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts.' Any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to that law extraterritorial effect."²⁹

"In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, *i. e.*, the law of the place where the parties act in making their agreement. If by that law

28. This becomes all the more apparent if we compare the conclusions of the different territorialists. See for example, Wächter, *Über die Kollision der Privatrechtsgesetze verschiedener Staaten* (1841) 24 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, 230; (1842) 25 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, 151, 361; Schmid, *op. cit. supra* note 25; Vareilles-Sommières, *La Synthèse du Droit International Privé* (1897).

29. Beale, *What Law Governs the Validity of a Contract*, *supra* note 26, at p. 267.

their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it." ³⁰

"The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so. . . ."

"This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory." ³¹

As has been shown above, the exclusive power to determine the legal consequences of operative facts can be assigned to a

30. *Ibid.* 268.

31. *Ibid.* 270-271; see also Minor, *Conflict of Laws* (1901) 410. Mr. Justice Holmes said in *Slater v. Mexican National R. R.* (1904) 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, 583:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart v. Baltimore & Ohio R. R.*, 168 U. S. 445. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Dennick v. Railroad Co.*, 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith v. Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

Compare with the above statement by Mr. Justice Holmes the following from Judge Learned Hand in *Guinness v. Miller* (1923, S. D. N. Y.) 291 Fed. 769, 770:

"However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."

particular state only by some supra-state authority; it does not follow from the nature of sovereignty nor from any self-evident theory of territoriality. So far as the rule of the place where the contract is made (state B) is deemed to determine the validity of such contract it must necessarily be, in the absence of any supra-state authority imposing such rule, because the state in which the question arises (state A) has seen fit to select the rule of such state.

However disappointing the foregoing conclusion may be to those who believe that there ought to be as far as possible one body of rules governing the problems of the Conflict of Laws in all countries, or to those who believe that the domestic rules should be the expression of "fundamental principles," nothing can be gained by hiding the truth and making it appear that certain rules govern in the nature of things. Such rules have not been discovered by the theoretical writers of the greatest eminence, nor has a consistent set of rules been worked out as yet by either the English or the American courts. The common law has not hidden in its bosom a logical set of rules which can be derived from its notion of territoriality. Sound progress in this field of the law, as in all other departments of knowledge, can be made only if the actual facts be faced, which show that the adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself.

Should the contention be made that the passages quoted on page 10 are not a deduction from an *a priori* principle, but merely the expression of what the common law courts have held on the subject, the answer must be that such contention does not rest upon fact. The English courts have not held that the validity of a contract shall be governed exclusively by the law of the place of contracting, nor have the American courts. It may be said without exaggeration that there is not a single state in this country which has uniformly and consistently subscribed to this doctrine. In the majority of the states it is rejected either in its entirety or it has received support only in particular instances or directions. Under the prevailing conditions the law of the place of contracting may be the better rule, or it may not be. The question is subject to argument, and the answer should not be foreclosed by any fictitious assumption regarding the existence of fixed general rules in the "common law."

What has been stated in the preceding paragraph applies to most questions in the Conflict of Laws. There are, relatively speaking, few rules of the Conflict of Laws which can be said to be recognized by all Anglo-American states, or by the great

majority of them. To the extent that there is such agreement, we may speak of them as common rules; but to assert that there are general rules of the "common law," to be derived from its notion of territoriality, which have binding force regarding matters concerning which there is little or no authority, or as to which the decisions are in total disagreement, is to assert something that is untrue, for it presents as existing and binding law something which has for its support merely the personal opinion of the person making such assertion as to what he believes would constitute a sound rule, and so far as such conclusion rests upon a general theory concerning the nature of law rather than a careful weighing of the conflicting interests and policies involved, it constitutes reasoning from a fictitious major premise.

The charge to be made against this mode of dealing with the problems of the Conflict of Laws is the same as that made by Dicey concerning the theoretical method in general, namely, "that it leads the writers who adopt it to treat as being law what they think ought to be law." That the *a priori* method has not yielded sound and satisfactory results, although it has been employed by the most eminent jurists on the continent for many years, is admitted by a very distinguished writer, who says:³²

"These imperfections (in the subject of the Conflict of Laws) do not result solely from the special character and complexity of the questions which Private International Law has for its object to resolve, but also from the defective method which has been used in its elaboration. The authors which have formulated its rules have almost always attempted to deduce them from a very general and very abstract notion: territorial sovereignty, personal sovereignty, community of law between states, international courtesy, or, what amounts to the same thing, mutual respect of one sovereign for another, maintenance of rights vested under the law of a foreign state, etc. The *a priori* principle, from which these authors have pretended to derive their theory, has always proved powerless to furnish or to justify a practical rule; on the contrary it has only too often misled such author in his search for a solution."

The notion that the rules of the Conflict of Laws can be derived from some general formula or theory is responsible for another doctrine—that of "public policy"—which in turn has caused the utmost confusion. Realizing that the logical deductions from their *a priori* theory could not be justified in all cases, the theoretical writers have allowed the ordinary rules,

32. Arminjon, *Le Domaine du Droit International Privé* (1922) 49 Clunet, 905.

which govern "on principle," to be set aside under certain circumstances by the rules of "public policy" or "public order." Anglo-American courts and writers, as we have seen,³³ also use language implying that the ordinary rules, governing "on principle," are the expression of the territoriality of law, as understood by Anglo-American countries. These also are allowed to be nullified on grounds of "public policy" by certain provisions of the law of the state in which the question arises. The foreign writers have tried their utmost to classify these provisions, and to clarify the doctrine of public policy, but without success.³⁴ The term is used in different senses according to the general point of view of the school to which the particular writer belongs or of the individual writer himself. Some use it in a comprehensive sense, so as to include what others regard as a special doctrine, namely, that of the evasion of law, or fraud upon the law.³⁵ Most frequently the doctrine of public policy is regarded as having merely a negative function, that of justifying the non-application of a "foreign" law, which ought to govern "on principle." Others assign to it also a positive function, according to which duties may be imposed contrary to those that would result from the application of the general rule. In this view, which is at times shared by the courts,³⁶ the doctrine of public policy is not merely a convenient safety-valve to prevent the application of "foreign" law, but a method whereby old rules are modified and new rules established. In England and the United States the doctrine of public policy is generally limited to its negative function, and no attempt has been made by the Anglo-American writers to reduce the cases falling within this doctrine to any system or order.

The doctrine of public policy in the Conflict of Laws ought to

33. *Supra* notes 29-31.

34. "No attempt to define the limits of that reservation (public policy) has ever succeeded, even to the extent of making its nature clearer than by saying that it exists in favor of any stringent domestic policy, and that it is for the law of each country, whether speaking by the mouth of its Legislature or by that of its judges, to determine what parts of its policy are stringent enough to require its being invoked." Westlake, *Private International Law* (6th ed. 1922) 51. For the literature on the subject see Beale, *Conflict of Laws* (1916) 77, 78, note; also Fink, *Die Prinzipien des Internationalen Privatrechts und die Vorbehaltsklausel* (1914) 24 ZEITSCHRIFT FÜR INTERNATIONALES RECHT, 138; Kusters, *Public Policy in Private International Law* (1920) 29 YALE LAW JOURNAL, 745.

35. To the effect that the doctrines should be kept apart, see Arminjon, *La Fraude à la Loi en Droit International Privé* (1920) 47 Clunet, 409; (1921) 48 Clunet, 62, 419.

36. France, Cass. July 22, 1903 (31 Clunet, 355); March 27, 1922 (49 Clunet, 115); App. Douai, March 26, 1902 (30 Clunet, 599); Italy, Trib. Civ. Livorno, May 5, 1894 (25 Clunet, 415).

have been a warning that there was something the matter with the reasoning upon which the rules to which it is the exception were supposed to be based. Judge Beach has called attention to the illogical character of this doctrine as between the different states of this country³⁷ and a similar charge may be made with respect to the application of this doctrine to foreign countries. If some power other than that of state A prescribes for A the rule that is to govern "on principle," if that rule is obligatory upon state A, how can state A deny effect to such rule in a particular case? If state A is bound to recognize the exclusive power of state B to attach legal consequences to certain operative facts, how can the courts of state A nullify the effect given to such operative facts by state B? If state B had the power to create "vested rights,"³⁸ so far as state A is concerned, why should such rights not be entitled to recognition if called in question in state A? Is it not strange to argue in the first place that state A has no choice in accepting the original rule and then to admit that it has the power to set aside the effect of that rule whenever it pleases on the plea that such recognition or enforcement would violate its public policy?

This situation has resulted from the fact that it has been deemed necessary to discover general principles which could claim binding authority. Only in this way was it possible to find on the continent a body of rules entitled to claim universal recognition, an aim which most theoretical writers have had before their eyes. In this country the finding of such general principles must have seemed indispensable, from the standpoint of the writers adopting the *a priori* mode of reasoning, to prevent confusion in this branch of the law, as might result, it was feared, if each state felt free, within constitutional limitations, to adopt the rules of the Conflict of Laws which its own sense of convenience, justice and policy might suggest. Only in this way can be explained the view that there is a set of fully developed common law principles which are binding upon the courts of the individual states.

The correct mode of approach to this subject would strip it of all fictions and deal with all phenomena *a posteriori*.³⁹ Thus viewed we find that each sovereign state can determine the rules of the Conflict of Laws in accordance with its own notions

37. Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE LAW JOURNAL, 656.

38. Professor Beale asserts that the common law courts have worked out indigenously a theory of vested rights. Beale, *Conflict of Laws* (1916) 105.

39. See Fink, *Die Prinzipien des Internationalen Privatrechts und die Vorbehaltsklausel*, *supra* note 34, at p. 164.

of what is just and proper, and so far as the individual states of this country are not bound by some constitutional provision, they have the same power.⁴⁰ From the standpoint of the Conflict of Laws all states are primarily interested in the proper administration of justice. Under modern conditions such an administration of justice often demands that a state shall take into consideration the rules of other states. Whether it will do so in a particular situation or not will depend upon the conclusion it reaches as to what is right and proper. In dealing with cases involving foreign elements the court will take into consideration the needs of international trade and the requirements of an increasing intercourse between states and nations. In certain cases, where the operative facts connect the case with some foreign state or country, it will conclude that the promotion of the above ends requires the application of "foreign" law. In other cases, in which the "foreign" law is so far opposed to the local law as to shock the conscience of the court, it will determine the case with reference to the local rule. As justice can be administered only in accordance with the sense of what is right existing in the community in which the court sits, the feelings of the local community cannot be disregarded altogether. The general problem is, therefore, always the same: What are the demands of justice in the particular situation; what is the controlling policy?

If the situation is one admitting of the application of "foreign" law, the choice of the rule to be applied will be determined again in many instances by general social or economic considerations. For example, if the question relates to capacity, a state may conclude that the principal interest involved is the protection of its citizens or of persons domiciled within its territory, wherever they may be. If this be so, it will probably say that the *lex patriae* or the *lex domicilii* governs "capacity." On the other hand, it may conclude that its principal interest in the matter is the security of local transactions. In this event it will say that the *lex loci contractus* governs capacity. Continental countries, however, have sometimes chosen both points of contact in this case.⁴¹ According to these the *lex patriae* governs capacity, but a person under disability according to his personal law, but not according to the *lex fori*, will not be allowed to set it up against the party contracting with him in the state of the forum.

A similar mode or reasoning would apply if the question re-

40. International law imposes practically no restraint. See Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, *supra* note 17, at p. 265, 278 ff.

41. See for example Art. 7, Introductory Law, German Civil Code.

lated to the validity of a foreign marriage. In this country the courts have come to the conclusion that the place where the marriage is celebrated is the point of contact in which each state is particularly interested, and by way of reciprocity they have deemed it best to apply the same point of view with respect to marriages celebrated abroad.⁴² The English and continental courts,⁴³ on the other hand, have reached a different conclusion with respect to "capacity," as to which they have preferred the personal law of the parties (*lex domicilii* or *lex patriae*). Some late English decisions have insisted upon two points of contact with respect to marriages by foreigners in England (the *lex domicilii* and the *lex loci celebrationis*).⁴⁴

Whatever the point or points of contact chosen by the *lex fori*, special situations may require the application of the local rule. Suppose, for example, that two citizens of the forum go into another state for the purpose of contracting a marriage which they could not enter into under the local law of the forum. In such a case the courts might reach the conclusion that the local interests of the state demand that its law should not be allowed to be evaded by its own citizens and that its local rule should therefore prevail.⁴⁵ In the customary phraseology, it would be said that the general rule would not be enforced on grounds of public policy.

Suppose, again, that a Mohammedan having two wives should attempt to cohabit with both within the limits of the forum. In this case, there would be no doubt that the local rule should have precedence. On the other hand, if a child, born of the second marriage in a country where polygamy is recognized, should claim by descent title to real property situated within the forum, the courts would no doubt recognize that claim. Intermediate situations between the illustrations given might give rise to considerable doubt as to whether in view of the local interests involved the marriage should be regarded as null and void. According to the traditional view it is customary to say that a polygamous marriage will not be recognized on grounds of public policy. Such a statement, however, is inaccurate, for a judge cannot close his eyes to the institution of polygamy in all cases, and it is only when it reaches a certain

42. See *Commonwealth v. Lane* (1873) 113 Mass. 458.

43. Lorenzen, *op. cit. supra* note 6, at p. 627, note.

44. *Chetti v. Chetti* [1909] P. 67; *Ex parte Mir-Anwaruddin* [1917, C. A.] 1 K. B. 634; see Dicey, *op. cit. supra* note 1, at p. 839.

45. *In re Stull's Estate* (1898) 183 Pa. 625, 39 Atl. 16; *Pennegar v. State* (1889) 87 Tenn. 244, 10 S. W. 305; *Wilson v. Cook* (1912) 256 Ill. 460, 100 N. E. 222. *Contra: Van Voorhis v. Brintnall* (1881) 86 N. Y. 18; *State v. Shattuck* (1897) 69 Vt. 403, 38 Atl. 81; *Dudley v. Dudley* (1911) 151 Iowa, 142, 130 N. W. 785.

point of contact with the law of the forum that it can be said to come into real conflict with its social policy. Only in these cases will the judge be justified to regard it as of no effect.⁴⁶

Anglo-American courts, it is submitted, have developed the rules of the Conflict of Laws in the main, though not always consciously, in the manner just outlined. Their aim has been to render a just decision under the circumstances of the particular case and they have reached their conclusions so far as possible by a consideration of the social interests involved. Many rules of the Conflict of Laws, it is true, have been followed without a reconsideration of the matter, because they were established elsewhere and appeared reasonable. The courts whose decisions were followed, having reached their conclusion in the manner above described and the local conditions being similar, there was no need of doing the work over again.

In many situations in the Conflict of Laws, where there are no social or economic considerations of a decisive character, the task of choosing the proper rule becomes extremely difficult. Whether the local rule shall be applied in these cases or some "foreign" rule will have to be determined as best it may in the light of analogy and the experience and practice of other states or nations. In these instances, it matters less what the rule is than that it shall be certain and so far as possible uniform.

So far as the Supreme Court of the United States is empowered to lay down compulsory rules of the Conflict of Laws for the courts of the different states under the "Full Faith and Credit" clause, the "Due Process" clause, etc., of the federal constitution, the individual states are not free to act as they please. The rules are imposed upon them, and in the nature of things the rules are dictated by what the Supreme Court conceives to be the general interest. The particular interests and policies of the different states are submerged in these cases in the general interest of the nation. But so far as the states are free to choose the Conflict of Laws rules they have the power of independent sovereigns who can, and do, determine their rules with reference to their own view of what justice demands.

The method above outlined, which, subject to the constitutional limitations referred to, gives to each state the power to assert in each problem of the Conflict of Laws its own views, seems at first sight less attractive than the method which seeks to derive the rules of the Conflict of Laws from some supra-state authority, be it that of international law, or, so far as the courts of this country and of England are concerned, that of a "common law" which is binding upon all. It seems to suggest

46. See COMMENT (1923) 32 YALE LAW JOURNAL, 471.

the absence of general rules and to necessitate the commitment of each case to the caprice of the particular judge before whom it may come. A closer study of the problem shows, however, that these fears are unfounded. So far as this country is concerned, it must be remembered that the Anglo-American legal tradition, which directs and controls our legal mode of reasoning, will in the very nature of things prevent our judges from acting in an arbitrary manner within the field of the Conflict of Laws. They will be guided by the experience of other common law states and will depart from their conclusions only if there are substantial reasons for so doing.

No doubt it would be better if there existed a supra-state authority with power to prescribe the rules of the Conflict of Laws. Each state would sacrifice in such event more of its local policies than it is disposed to do to-day, but as an equivalent for such sacrifice it would gain the advantages resulting from greater harmony in the administration of international justice.

By accepting some *a priori* theory for the solution of the Conflict of Laws, a state is obliged to make a similar sacrifice of its local policies without gaining a corresponding benefit from greater international uniformity, for all *a priori* views, whether based upon some theory concerning the binding nature of international law or upon some theory concerning the territoriality of law, express only the theory which the particular writer has in mind. There are thus as many theories as there are writers and consequently as much contrariety in the results as before. Notwithstanding the vogue that *a priori* theories have enjoyed during the last century on the continent, no approach toward uniformity has been attained. There is no reason, therefore, why our courts should give up their traditional way of working out the problems of the Conflict of Laws in favor of any *a priori* theory which has no support other than that of the person advocating the same.

2. THE *RENOI* THEORY AND THE APPLICATION OF FOREIGN LAW* ¹

I. *RENOI* IN GENERAL

NO QUESTION in the Conflict of Laws has given to the jurists of continental Europe greater difficulty during the last thirty years than the so-called *renvoi* theory. The following example may serve to suggest the problem. Suppose a citizen of the United States, formerly a resident of the State of New York, dies domiciled in Italy, leaving personal property in the State of New York, and that a question arises before the New York courts with respect to the distribution of such property. The obvious answer is: The *lex fori* having adopted the rule that the law of the domicile of the deceased at the time of his death shall govern the distribution of his personal estate, Italian law is to be applied. But what is meant by Italian law? Is the New York judge to apply the Italian statute of distributions, or is he directed by the *lex fori* to apply Italian law in its totality, *i. e.*, including its rules governing the Conflict of Laws? Should the *lex fori* refer to Italian law in the latter sense, it would be found that in the Italian system of Private International Law the *lex patriæ* has supplanted the *lex domicilii* in the present instance. If the question came before an Italian judge the personal estate would be distributed in accordance with the law of the country of which the deceased was a citizen or subject at the time of his death, that is, New York law.

The view that under the above circumstances the New York judge should apply the statute of distributions of his own State is generally known as the *renvoi* theory. It should be observed at the very outset that the term *renvoi* is used as a convenient descriptive term denoting that the judge of the forum is to take account of the rules of Private International Law prevailing in the country to which the *lex fori* refers, without regard to any particular theory or to the particular law which may be deemed to control in the end. Unless the contrary appears, this wider

* (1910) 10 COLUMBIA LAW REVIEW 190, 327.

1. The *Journal du droit international privé* will be referred to in this article by "Clunet," the *Revue de droit international privé et de droit pénal international*, by "Darras," the *Zeitschrift für internationale Priv- und Strafrecht*, by "Niemeyer," and the *Annuaire de l'Institut de droit international*, by "Annuaire."

meaning will attach to the term *renvoi* in the present article. In its strict sense it would imply that the foreign law, having jurisdiction in the matter, had referred the case back to the *lex fori*.

The problem is a general one and is not confined to those branches of the law in which the *lex domicilii* and the *lex patriæ* clash (status, succession, etc.). It arises whenever the rules of Private International Law of the countries in question differ. The question, therefore, is: Must the judge when the law of the forum prescribes the application of a foreign law take notice of the rules governing the Conflict of Laws in such foreign country, and, if he must, in what sense and to what extent?

Notwithstanding its fundamental nature in the science of Private International Law the above question was not raised by the earlier writers on the subject, though occasion was not wanting.² They appear to have assumed that in the nature of things the rules of Private International Law were to point out the law which should itself distribute the property, determine the capacity, decide upon the validity of a marriage, etc., and thus called for the application of the internal or territorial³ law of the foreign State to the exclusion of its rules of Private International Law. Even in modern times the same assumption appears to have been made by the continental jurists as well as by those of England and the United States. It was not until the adoption of the *renvoi* doctrine by the French Court of Cassation in the *Forgo* case, decided in 1882,⁴ that the problem attracted the serious attention of the jurists.⁵ From this time on

2. There were differences of view as to whether a statute was real or personal, whether the domicile of origin or the actual domicile should govern, as to whether the rule *locus regit actum* was imperative or not, etc. See Lainé, *Introduction au droit international privé*. 2 vols., 1888, 1892.

3. The word "territorial" in this article denotes the municipal law of a country exclusive of its rules governing the Conflict of Laws.

4. This case, which gave rise to much litigation in France, was set at rest through two decisions of the Court of Cassation, D. 1879, 1, 56; D. 1882, 1, 301. It involved succession to personal property left in France by a Bavarian subject, who was domiciled *de facto* in France, though he had not acquired an authorized domicile there. Under the French law, the *lex patriæ* governed under the circumstances. It being proved, however, that the courts of Bavaria would distribute the property in accordance with the *lex domicilii*, it was held that French law became applicable.

5. The eminent Belgian jurist, Laurent, appears to have been the first to call attention to the error underlying the *renvoi* theory. See his note to App. Brussels, May 14, 1881, S. 1881, 4, 41. But it was J. E. Labbé, a distinguished professor of the University of Paris, who, in an article entitled "*Du conflit entre la loi nationale du juge saisi et une loi étrangère relativement à la détermination de la loi applicable à la cause*" (12 Clunet 5-16), in which he disagreed with the conclusion of the Court of Cassation

until its rejection by the Institute of International Law at its session at Neuchâtel in 1900, the *renvoi* theory, by reason of its fundamental character in the application of foreign law, has occupied the first rank in the theoretical discussions relating to the Conflict of Laws.

Long before the *Forgo* case similar conclusions had been reached in England⁶ and in Germany,⁷ while contemporaneously therewith the Court of Appeals of Brussels, in *Bigwood v. Bigwood*,⁸ introduced the same doctrine into the jurisprudence of Belgium. In all of these cases, it would seem, neither counsel for the interested parties nor the courts were aware of the fact that the application of foreign law could mean anything but foreign law in its totality. The *Bigwood* case has been followed consistently in Belgium ever since.⁹ The *Forgo* case has been followed by the lower courts of France¹⁰ until recently, when, as a result of the strong sentiment against the doctrine entertained by the French jurists, two Courts of Appeal have held to the contrary.¹¹ The earlier cases in Germany agreed with the Court of Lübeck in sanctioning *renvoi*,¹² but the later cases took strong exception to

in the *Forgo* case, raised the issue in such a forceful manner that it could thereafter no longer be ignored.

6. *Collier v. Rivaz* (1841) 2 Curt. Ecc. 855.

7. OLG Lübeck, March 21, 1861 (14 Seuffert's *Archiv* 164).

8. App. Brussels, May 14, 1881 (*Belgique Judiciaire*, 1881, p. 758).

9. Trib. Civ. Brussels, March 2, 1887 (14 Clunet 748), succession; App. Brussels, Dec. 24, 1887 (D. 1889, 2, 97), legitimation—reserve; Trib. Nivelles, Feb. 19, 1879 (*Belgique Judiciaire*, 1880, p. 982), succession; Trib. Civ. Brussels, Dec. 1, 1894 (23 Clunet 895), grounds for divorce; Trib. Civ. Antwerp, March 16, 1895 (23 Clunet 655), jurisdiction for divorce.

10. Trib. Civ. Seine, May 19, 1888 (15 Clunet 791), status—interdiction (*semble*); App. Paris, March 23, 1888 (D. 1889, 2, 117), status—legitimation; Trib. Civ. Seine, July 26, 1894 (21 Clunet 1007), status—filiation (*obiter*); Trib. Civ. Tunis, March 25, 1890 (18 Clunet 238), form of donation (*obiter*); Trib. Civ. Seine, April 6, 1894 (21 Clunet 531), status—judicial council; App. Paris, July 31, 1895 (S. 1899, 2, 105), status—judicial council (*semble*); App. Lyons, July 29, 1898 (26 Clunet 569), patronymic name; App. Douai, Feb. 2, 1889 (26 Clunet 825), succession to movables; App. Paris, March 15, 1889 (26 Clunet 794), status—interdiction (*semble*); Trib. Civ. Seine, Dec. 4, 1889 (27 Clunet 368), succession to movables; Trib. Pau, April 19, 1901 (29 Clunet 858), wills—capacity; Trib. Civ. Marseilles, July 19, 1905; App. Aix, July 19, 1906 (34 Clunet 152), succession to immovables.

11. App. Paris, Aug. 1, 1905 (D. 1906, 2, 169), succession to movables; App. Pau, June 11, 1906 (D. 1907, 2, 1), wills—validity—legitimate portion; see also Trib. Civ. Seine, Feb. 10, 1893 (20 Clunet 530), capacity.

12. RG Jan. 27, 1888 (20 RG 351), succession; RG Feb. 4, 1892 (2 Nie-

the doctrine.¹³ The change of view was noticeable also in the decisions of the Court of the Empire. Since 1900 the question has been settled in Germany by the provisions of Articles 27 and 28 of the Law of Introduction to the German Civil Code, which will be considered hereafter. In Switzerland the Supreme Court has rejected *renvoi* with respect to foreign countries,¹⁴ but it has sanctioned it with regard to inter-cantonal law.¹⁵ *Renvoi* has been sanctioned recently also by a lower court of Spain¹⁶ and of Portugal,¹⁷ but it has been rejected by the courts of Italy.¹⁸ As to non-continental countries, exclusive of England and the United States, *renvoi* conclusions were reached only in the case of *Ross v. Ross*, decided by the Supreme Court of Canada.¹⁹

An examination of the cases supporting the view that the rules of the Conflict of Laws call for the application of foreign law in its totality reveals in the first place the fact that in all of them the court was thereby enabled to apply its own law. It is noticeable also that in the great majority of cases in which it prevailed the *lex domicilii* came into conflict with the principle of nationality. Most of the cases related to succession, intestate or testamentary. There appears to be no case in Belgium, France or Germany in which *renvoi* was allowed with respect to contracts or property rights; in the cases in which such contention was made it was disallowed. In regard to succession, it has been applied in France both to movable and immovable property. In its application to form (*locus regit actum*) the remarks of the Civil Court of Tunis and of the Supreme Court of Canada, in *Ross v. Ross*, favoring the application of *renvoi*

meyer 469), testamentary succession; Karlsruhe, Oct. 16, 1885 (51 *Badische Annalen* 373, cited in 30 *Ihering's Jahrbücher für die Dogmatik* 12), succession.

13. RG May 31, 1889 (24 RG 326), guardianship; RG April 24, 1894 (5 Niemeyer 58), testamentary succession; RG March 3, 1896 (36 RG 205), succession; RG July 11, 1898 (9 Niemeyer 116), divorce—alimony; OLG Karlsruhe, Oct. 23, 1897, and RG Apr. 19, 1898 (9 Niemeyer 134), succession; LG Strassburg, Oct. 31, 1892 (3 Niemeyer 416), succession; LG Strassburg, June 13, 1892 (3 Niemeyer 520), testamentary succession; OLG Kolmar, May 19, 1893 (4 Niemeyer 151), contract.

14. *Bundesgericht*, April 6, 1894 (25 *Clunet* 1095), capacity.

15. *Bundesgericht*, March 27, 1895 (37 *Zeitschrift für Schweizerisches Recht* 24), matrimonial property.

16. Barcelona, August 3, 1900 (28 *Clunet* 911), succession. The court decided the case upon the opinion of a Spanish jurist, who himself misunderstood the attitude of the Conference of The Hague in regard to *renvoi*.

17. Lisbon, Apr. 6, 1907 (35 *Clunet* 367), succession.

18. Cass. Rome, Jan. 5, 1906 (34 *Clunet* 1205), capacity; Trib. Salerno, June 6, 1899 (65 *Archivio Giuridico* 349), succession.

19. (1894) 25 Can. S. C. 307.

were really *obiter* and led, in *Ross v. Ross*, to the filing of a strong dissenting opinion on that point by Justice Taschereau.

The case-law, then, as it stands to-day, outside of England and the United States, gives support to the doctrine that foreign law means the law in its totality only in the cases in which the *lex domicilii* and the *lex patriæ* come into conflict and the judge is thereby enabled to apply his own law. And even as thus limited the doctrine finds real support only in the decisions of Belgium and of France.

Before the adoption of the German Civil Code *renvoi* was recognized by way of legislation only in isolated instances. It existed to some extent in several of the Swiss cantons²¹ and it was contained also in section 108 of the Hungarian law of December 18, 1894, relating to marriage.²² Japan has followed the example of the German Code with respect to *renvoi*.²³ Elsewhere there appears to be no legislative support for the doctrine.

The opinion of textwriters is overwhelmingly in favor of the doctrine that the rules of Private International Law refer to the internal or territorial law of the foreign country exclusive of its rules governing the Conflict of Laws.²⁴ The conclusion to

21. See, 1 Meili, *Internationales Civil-und Handelsrecht*, 171.

22. See *Annuaire de Législation Étrangère*, 1895, p. 377.

23. Art. 29 of the Law of Ho-rei, of June 15, 1898. See Yamada, 28 *Clunet* 635.

24. AUSTRALIA. *In favor*: Brown, 25 *Law Quar. Rev.* 148, 153.

AUSTRIA-HUNGARY. *Against*: Rostworowski, 18 *Annuaire* 176; de Roszkowski, 18 *Annuaire* 176; Strisower, 17 *Annuaire* 18n.

BELGIUM. *In favor*: Rolin, *Principes de droit international privé*, vol. 1, p. 258; 17 *Annuaire* 215-216; de Paepe, *Revue de droit international et de législation comparée*, 1900, p. 378. *Against*: Laurent, S. 1881, 4, 41.

BRAZIL. *In favor*: Bevilacqua, *Elementos de direito internacional privado*, 1906, § 20. *Against*: Carvalho, *Nova consolidação das leis civis*, art. 25, § 1; Octavio, *Direito do estrangeiro no Brazil*, 1909, n. 323.

CUBA. *In favor*: P. Desvernine, *Una consulta de derecho internacional privado*, 1890, pp. 17-18 (cited by Bustamante, *El orden publico*, 159). *Against*: Bustamante, *El orden publico*, 167; 17 *Annuaire* 219-220; N. Trelles, *Una consulta de derecho civil*, 51 (cited by Bustamante, *El orden publico* 160).

ENGLAND. *In favor*: Dicey, *Conflict of Laws* (2d ed.) 715-716; Piggott, *Foreign Judgments* (3d ed.) II, 261-264; Westlake, *Private International Law* (4th ed.) 25-40; 17 *Annuaire* 217-219; 18 *Annuaire* 35-40, 164-168. *Against*: Bate, *Notes on the doctrine of Renvoi in Priv. Int. Law*, London, 1904; Holland, 18 *Annuaire* 176.

FRANCE. *In favor*: Colin, 2 *Darras* 769; D. 1907, 2, 1; Weiss, *Traité de droit international privé*, vol. 3, pp. 77-81; 18 *Annuaire* 150-151; Chausse, *Revue critique de législation et de jurisprudence*, 1888, p. 197; 24 *Clunet* 23; Vareilles-Sommières, *La Synthèse du droit international privé*, vol. 2, pp. 97-98. *Against*: Audinet, *Principes élémentaires de droit international privé* (2d ed.) Nos. 314-316; S. 1899, 2, 105; Martin, 30

Revue de droit international et de législation comparée, 129-187, 272-310; D. 1898, 2, 281; Baudry-Lacantinerie and Houques-Fourcade, *Traité des personnes* (2d ed.), vol. 1, No. 207 (formerly favoring *renvoi*); Chrétien, 13 *Clunet* 174, n. 2; De Boeck, D. 1889, 2, 97; Despagne, *Précis de droit international privé* (4th ed.), No. 106; 25 *Clunet* 263-264; Dupuis, 18 *Annuaire* 176; Descamps, 18 *Annuaire* 176; Fauchille, 18 *Annuaire* 176; Labbé, 12 *Clunet* 5-16; Lainé, 23 *Clunet* 241-261, 481-494; 2 Darras 605-643; 3 Darras 43-72, 313-339, 661-674; 4 Darras 729-758; 5 Darras 12-40; 17 *Annuaire* 14-36; 18 *Annuaire* 34; Ligeoix, 30 *Clunet* 481-498, 31 *Clunet* 551-567; Pic, D. 1899, 2, 410; Pillet, 21 *Clunet* 721; S. 1896, 2, 75; 17 *Annuaire* 220-221; 18 *Annuaire* 148-150; *Principes de droit international privé*, Nos. 63-66; *Droit international privé* 239-242; Lyon-Caen, 18 *Annuaire* 176; Renault, 18 *Annuaire* 176; Surville et Arthuys, *Cours élémentaire de droit international privé* (3d ed.), 49.

GERMANY. *In favor*: v. Bar, *Theorie, und Praxis des internationalen Privatrechts* 279-281; 2 Holtzendorff's *Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler), 19; 8 Niemeyer, 177-188; 18 *Annuaire* 41, 153-157; 174-175; Barazetti, 8 Niemeyer 35-36; Dernburg, *Das bürgerliche Recht des deutschen Reichs und Preussens*, vol. 1, p. 97; Keidel, 28 *Clunet* 82-96; Harburger, 18 *Annuaire* 176; Neumann, *Verhandlungen des deutschen Juristentages*, 1898, I, p. 187; Schnell, 5 Niemeyer 337-343. *Against*: Ennecerus, *Verhandlungen des deutschen Juristentages*, 1898, I, pp. 76, 95-97; Gierke, *Deutsches Privatrecht*, vol. 1, p. 215; Kahn, 30 *Ihering's Jahrbücher für die Dogmatik* 9-34; 36 *id.* 366-408; 40 *id.* 56-69; 45 *Kritische Vierteljahresschrift für Gesetzgebung* 620-623; Klein, 27 *Archiv für bürgerliches Recht* 252-282; v. Liszt, 18 *Annuaire* 176; Mitteis, *Verhandlungen des deutschen Juristentages* 1898, I, pp. 76, 95-97; Niemeyer, *Methodik* 15-17; Niemeyer *Kodifikation* 82-86; Planck, *Bürgerliches Gesetzbuch* (3d ed.), vol. 6, p. 104; Regelsberger, *Pandekten*, vol. 1, pp. 164-165; Silberschmidt, 8 Niemeyer 100-101; Zitelmann, *Internationales Privatrecht*, vol. 1, pp. 242-243.

The German Bar Association pronounced itself against *renvoi* with respect to contracts. *Verhandlungen des deutschen Juristentages*, 1898, iv, p. 127. (The arguments advanced against *renvoi* would apply with equal force to all other branches of the law.)

GREECE. *Against*: Streit, 18 *Annuaire* 162-164; 6 Niemeyer 198.

HOLLAND. *Against*: Asser, 32 *Clunet* 40; 18 *Annuaire* 159-161.

ITALY. *In favor*: Brusa, 17 *Annuaire* 227-228; 18 *Annuaire* 177; Fiore, 28 *Clunet* 424-442; 681-704. *Against*: Anzilotti, *Studi critici di diritto internazionale privato* 194 (cited by Buzzati, *Trattato di diritto int. privato secondo le convenzioni dell'Aja*, I, p. 111n); Buzzati, *Il rinvio*, Milan, 1898; *Revue de droit international et de législation comparée*, 1901, pp. 272-278; *Trattato di diritto internazionale privato secondo le convenzioni dell'Aja*, I, pp. 105-120; 8 Niemeyer 449-456; 11 Niemeyer 3-15; 17 *Annuaire* 14-36; 18 *Annuaire* 43, 146, 152, 167, 168; Catellani, 18 *Annuaire* 169-170; Corsi, 18 *Annuaire* 176; Fedozzi, 65 *Archivio Giuridico* 352; Fusinato, 17 *Annuaire* 18n; Olivi, *Revue de droit international et de législation comparée*, 1900, pp. 31-32; 17 *Annuaire* 18n; Pierantoni, 17 *Annuaire* 18n; Sacerdoti, 17 *Annuaire* 18n.

PORTUGAL. *In favor*: da Veiga Beirao, 35 *Clunet* 367. *Against*: Midosi, 18 *Annuaire* 176.

RUSSIA. *In favor*: Ivanowsky, 17 *Annuaire* 16n.

SERVIA. *Against*: Vesnitch, 18 *Annuaire* 176.

SPAIN. *In favor*: de Dios Trias, 28 *Clunet* 905-911; Torres Campos, 17 *Annuaire* 16n.

be derived from the great mass of juristic literature which has grown up since Labbé drew attention to the question may be stated in the words of that distinguished Dutch statesman and jurist, Asser:

"The science of Private International Law . . . must designate the law applicable to each jural relationship. We have no hesitancy in declaring that in our opinion the learned jurisconsults who have opposed the system of *renvoi* have proved in an irrefutable manner that the science of Private International Law has for its aim the direct designation of the very law which is to govern the legal relationship and that its aim must not consist merely in referring to the rules governing the Conflict of Laws in such country.

"When the science teaches us, for example, that the status of an individual is governed by his national law, it is the national law regulating the status that is meant, and not a disposition of the national law which might declare another law, for example, that of the domicile of the individual, applicable to this status.

"The science, in declaring applicable the national law, or the law of the situation of the property, or any other law, has been guided by considerations derived from the nature of the legal relationship in question. It is, therefore, the law itself indicated by it that must be applied, and not another law to which it refers and which could not have been considered by the science."²⁵

The question of *renvoi* was discussed by the members of the Institute of International Law at its sessions at The Hague in 1898,²⁶ and at Neuchâtel in 1900.²⁷ Article 1 of the final conclusions submitted by the very able report of Lainé and Buzzati, "*rapporteurs*" of the commission to which the question had been committed for preliminary study reads:

"When a legislator, laying down a rule of Private International Law, indicates a rule of foreign civil law as being directly applicable by his courts, he must not subordinate the application of this rule to the condition that it is prescribed also by the foreign legislation, of which the rule of civil law so indicated forms a part."²⁸

SWITZERLAND. *In favor*: 1 Brocher, *Cours de droit international privé* 167; Wolf, 37 *Zeitschrift für schweizerisches Recht* 20-24; Roguin, 18 *Annuaire* 170-172; Boiceau, 18 *Annuaire* 176. *Against*: Hilty, 18 *Annuaire* 176; Kebedgy, 18 *Annuaire* 176; Lehr, 18 *Annuaire* 176; Meili, *Das Internationale Civil-und Handelsrecht* 168-169; International Civil and Commercial Law (transl. by Kuhn), 372.

UNITED STATES. *Against*: E. H. Abbott, Jr. 24 *Law Quart. Rev.* 133, 146; 20 *Harv. L. Rev.* 227.

25. 32 *Clunet* 40-41.

26. 17 *Annuaire* 14-36, 212-230.

27. 18 *Annuaire* 34-41, 145-178.

28. 18 *Annuaire* 34.

Great difference of opinion arose with respect to the exact meaning of the above conclusion, the doubt relating mainly to the question whether it referred to actual law or embodied merely an abstract principle. At the end of the discussion it was decided to vote first upon the principle contained in Article 1. The principle rejecting *renvoi* was adopted by a vote of 22 to 6.²⁹ The resolution finally passed with practical unanimity was expressive of a mere wish, and reads as follows:

"When the law of a State governs a conflict of laws in the matter of private law it is desirable that it should designate the rule of law to be applied in each case and not the foreign rule governing the conflict in question."³⁰

Courts admitting *renvoi* have said that in the application of foreign law the judge should consider himself as sitting in the foreign country.³¹ Thus interpreted the *lex domicilii*, for example, would be equivalent to a declaration on the part of the *lex fori* that the case in reality belongs to the State in which the domicile has been established, whose law in its totality would, therefore, necessarily govern. Whatever its rule of Private International Law on the point in question, it would on principle be binding upon the judge of the forum, subject to such limitation as the public policy of the forum might establish. If, therefore, the foreign law should have substituted the *lex patriæ* for the *lex domicilii* in its Private International Law, the judge of the forum would have to follow the directions of such foreign law, which, according to the circumstances of the case, might lead to the application of the law of the forum or to that of a third country. When the judge of the forum is thus sent back by the foreign law to the *lex fori* we would have true *renvoi*; when he is directed to apply the law of a third State it would be a case of transmission, or, to use the equivalent German term generally employed, *Weiterverweisung*.

From a theoretical standpoint the fatal objection to the application of foreign law in its totality in the sense that the judge of the forum is to regard himself for the purpose in ques-

29. The following jurists voted in favor of the principle: Asser, Boiceau, Buzzati, Catellani, Corsi, Descamps, Dupuis, Fauchille, Hilty, Holland, Kebedgy, Lehr, de Liszt, Lyon-Caen, Midosi, Renault, Rostworowski, de Roszkowski, Sacerdoti, Streit, and Vesnitch.

The following voted against the principle, that is, in favor of *renvoi*: v. Bar, Brusa, Harburger, Roguin, Weiss, Westlake. See 18 *Annuaire* 176-177.

30. 18 *Annuaire* 179.

31. *Collier v. Rivaz* (1841) 2 Curt. Ecc. 855; Lübeck, March 21, 1861 (14 *Seuffert's Archiv*, 164); RG, January 27, 1888 (20 RG 351).

tion as a judge of the country to which the *lex fori* refers is, that upon strict principles of logic it can lead to no solution of the problem. Suppose, for example, a Dane is domiciled in Italy, where he dies, leaving personal property in Denmark, and that the question pending in a Danish court involves the distribution of such estate. Under the above theory the Danish law would direct its courts to apply the *lex domicilii*, i. e., Italian law in its totality. As under Italian law the *lex patriæ* of the deceased is to govern the distribution of his property, the Danish judge should logically be referred back to Danish law in its totality, for the *lex domicilii* in the Conflict of Laws cannot be deemed to have one meaning and the *lex patriæ* another. Both must refer either to the internal or material law of the foreign country or to the foreign law inclusive of its Private International Law.

“ ‘Otherwise,’ as the report of the first commission of the Institute of International Law well expressed it, ‘one would fall into the absurdity of having to admit that a legislative provision establishes one thing when it is applied by the national judge and an entirely different thing when it is applied by a foreign judge; that a rule of international law changes its meaning, nature, function as soon as it passes the frontiers of the State in which it was promulgated.’ ” ³²

There would appear to be no escape in legal theory from this circle or endless chain of references.³³ Even Westlake³⁴ and v. Bar,³⁵ who favor *renvoi* in another form, have recognized the impossibility of breaking the chain upon principle after the

32. 17 *Annuaire* 25.

Where the foreign law, instead of sending the judge of the forum back to his own law, would refer him to the law of a third country, he “would be obliged, ‘to use again the language of the First Commission of the Institute of International Law,’ either to travel over half of the universe with his investigation, passing from *renvoi* to *renvoi*, or, according to circumstances, he would encounter two foreign laws, each of which in turn sending the decision to the other, without finding any ground for preferring one to the other.” 17 *Annuaire* 26.

33. See Audinet, *Principes élémentaires de droit international privé* (2d. ed.), 234; S. 1899, 2, 105; Bartin, *Revue de droit international et de législation comparée* 144; Buzzati, 18 *Annuaire* 146; Kahn, 30 *Ihering's Jahrbücher für die Dogmatik* 23; Lainé, 23 *Clunet* 257; 3 Darras 48; Ligeoix 30 *Clunet* 485; Pillet, *Principes de droit international privé* 161; *Droit international privé* 241; 1 Regelsberger, *Pandekten* 164–165.

This theory has been appropriately described as involving a game of battledore and shuttlecock (1 Regelsberger, *Pandekten* 164), or as international lawn-tennis (Buzzati, 18 *Annuaire* 146).

34. Westlake, *Private International Law* (4th ed.), 31.

35. v. Bar, *Theory and Practice of Private International Law* (Gillespie's transl.), 209n.

first reference. The courts that have sanctioned *renvoi* actually break it in this place and allow the foreign law to have the last word in the matter, a view approved by Professor Weiss of the *École de Droit*, Paris,³⁶ and by Dicey,³⁷ but this is only an expedient resorted to in order to reach a solution. But even if there were nothing illogical³⁸ in breaking off after the first reference, the strongest scientific reasons, to be considered hereafter, would speak against the doctrine of *renvoi* in this form.

From a practical standpoint it should be noted that the result reached under this theory of true *renvoi* or *Weiterverweisung* would depend (1) upon the rule relating to the Conflict of Laws prevailing in the foreign country upon the point in question; (2) upon the further question whether such foreign law itself sanctioned *renvoi* in one form or another. Assume, for example, that two Englishmen, A and B, leave movables in England, and that A dies domiciled in Italy, and B in France, but without having acquired an authorized domicile in the French sense. Under these circumstances the Private International Law of both France and Italy would require that the property be distributed according to English law. But *renvoi*, which is sanctioned by the courts of France, is not a part of the Italian system of Private International Law. It would follow, granted *renvoi* in the above sense is a part of the law of England, that A's next of kin would be actually determined by the English statute of distributions, while B's next of kin, owing to the fact that *renvoi* is also a part of the French law, would be determined by the French statute.³⁹ It is apparent also that in those cases in which the law of two foreign countries is involved, as for example in the case of legitimation by subsequent marriage under the English rule of Private International Law when the parties have changed their domicile between the

36. 3 Weiss, *Traité de droit international privé* 80.

37. Dicey, *Conflict of Laws* (2d ed.), 721-722. So, practically, Piggott, *Foreign Judgments* (3d ed.), II, pp. 263-264.

38. Zitelmann, Professor of the University of Bonn, says that the attainment of a reasonable result being the object of all interpretation, it must be assumed, in order to obviate the absurd consequence referred to, to have been the legislative intent that there should be only one reference. (*International Privatrecht*, vol. 1, pp. 240-244.) Zitelmann is followed by Klein, 27 *Archiv für Bürgerliches Recht* 266-267. Buzzati's answer to Zitelmann is that the interpretation itself must be reasonable, which it is not when it is necessary to admit that the same rule of the Conflict of Laws says one thing when applied by a foreign judge and the opposite thing when applied by a national judge. *II Rinvio* 81.

39. These are the logical results when the local judge is required to decide a case in the same manner as it would be decided by the courts of the foreign country.

time of the birth of the child and the marriage, obviously an impossible task would be asked of the judge if he were required to let each of them have the last word with respect to the matter in controversy.

Fiore, the distinguished Italian jurist, would allow the application of foreign law in its totality in all cases governed by the personal law of the parties. Following Mancini, he holds that the country of which a person is a subject, though he is domiciled in another State, should be regarded as the competent legislative authority with respect to all matters affecting his person and that to the extent such jurisdiction has been exercised by the national legislator it must be recognized by all other countries. Hence, if the national legislator should prescribe that the *lex domicilii* shall govern in a given case, such direction must be followed.⁴⁰

Fiore's deductions would appear to be entirely sound, but his assumption regarding the competency of the national legislator is in conflict with the generally established law or accepted theory on the continent, as well as with the principle of the territoriality of the law firmly imbedded in the common law.⁴¹

v. Bar, Professor of International Law at the University of Gottingen, and Westlake, contrary to the preceding theories, contend in favor of the application of the *lex fori* whenever there is disagreement in the rules of Private International Law in the countries concerned. Both conclude that under such circumstances there is in reality no conflict at all, but a gap in the legislation which the *lex fori* is called upon to fill as a subsidiary law. Westlake's formulation of this theory, which in some respects is more logical than that of v. Bar,⁴² is substantially as follows:

"A distinction between internal law and international law belongs only to the science of law but does not actually exist. Suppose a legislator says (a) that the capacity to make a will shall be acquired at the age of 19; (b) that the capacity of persons shall be governed by their national law. Rule (a) would have no meaning without rule (b). Whose testamentary capacity is acquired at 19? No answer can be given without the aid of rule (b) fixing the category of persons whose capacity the legislator believes he has a right to fix. According to (b), (a) says that the capacity of the subjects of the legislator is

40. 28 Clunet 424-442, 681-704.

41. For an extended analysis and criticism of Fiore's theory see, Lainé, 3 Darras 51-53, 319-335; 5 Darras, 21-24.

42. With respect to v. Bar's theory consult his *Theorie und Praxis des internationalen Privatrechts*, I, pp. 279-281; 2 Holtzendorff's *Encyclopadie der Rechtswissenschaft* (6th ed. by Kohler), 19; 8 Niemeyer 177-188; 18 *Annuaire* 41, 153-157, 174-175.

acquired at 19, but (b) says nothing regarding the capacity of foreigners domiciled within its territory. If rule (b) had said that capacity shall be governed by the law of domicile it would have said nothing regarding the capacity of its own subjects domiciled abroad.

"In whatever terms rule (b) may be expressed its true sense would be limited to the cases which, according to the ideas of the legislator, fall within his authority. There are normal cases which the legislator deems to belong to him and with regard to which he intends to legislate. The Danish legislator, for example, who attaches a decisive importance to domicile, will regard as the normal case in the matter under discussion a person domiciled in Denmark for which he fixes the age at 21. The Italian legislator, on the other hand, attaching a decisive importance to nationality the normal case will be that of an Italian subject and for him he fixes the age at 19.

"A legislator who regards a certain case as normal will regard analogous cases as being normal for other legislators and as belonging to them. A Danish legislator, therefore, will direct his judges to assign to persons domiciled in a foreign country such capacity as such foreign legislator may have attributed to them, and the Italian legislator will do the same with respect to the capacity of foreigners which their national legislator has attributed to them.

"By means of this second step the Danish legislator disposes of persons domiciled in a country whose legislation in the matter is also based on the *lex domicilii*. But it does not provide a rule for persons domiciled in a country, such as Italy, whose legislation is silent as to the capacity of persons domiciled in such jurisdiction. A third step is here necessary, viz., to direct the judge to apply in the absence of another law, the normal law. The Dane domiciled in Italy will be deemed in Denmark, therefore, to have reached the age of testamentary capacity only at 21 and in Italy, at the age of 19.

"As to what the Germans call *Weiterverweisung*, suppose two citizens of New York (capacity to contract being governed there by the *lex loci*) enter a contract in Italy, being at that time domiciled in France, and that litigation with respect thereto arises in England. The *lex fori* (England) applying the law of the domicile at the time of the making of the contract to determine the capacity of the parties to enter it will refer the matter to France. France having adopted the principle of nationality with respect to capacity, will answer: 'The case does not belong to me; it belongs to the New York legislator.' Should the English judge, following the direction of the French law, ask the New York law it would tell him that, in its opinion, the case did not belong either to New York, but (under the rule *lex loci*) to the Italian legislator.

"But under rule (b) the English judge need not follow the direction given by France to consult New York law. Instead he should apply the normal law of his own country, rule (a). The judge must determine in the first instance to which country the legal relationship presented to him belongs; if the law of the latter, based upon another system regarding the Conflict of Laws, says that the case does not

belong to it, there is no further reference to the law of a third state." 43

A necessary consequence of the theory propounded by v. Bar and Westlake is that it must lead to the rejection of *Weiterverweisung* (transmission). By regarding the aims of the science of Private International Law as confined to a determination of the limits of the application of the domestic law without a corresponding definition of the application of the foreign law, they are led to the view that whenever the rules of Private International Law of two countries differ there is in reality no provision in either legislation regarding the point in question; hence, the judge of the forum, being under an obligation to render a decision in the case, has no recourse except that of applying the *lex fori*.

Without dwelling upon the singular results⁴⁴ that would be obtained if Westlake's theory that there is in reality no positive conflict but merely a mutual disclaimer of jurisdiction became accepted law, it is easy to show that it rests upon premises which lack all real support. His point of departure—that there is an inseparable connection between the rules of Private International Law of a given country and its internal or territorial law, so that, according to the real intention of the legislator, the former must be deemed to define the limits of the latter's application, cannot be admitted. In Roman Law, for example, there were no rules of Private International Law in the proper sense; hence it would appear that the Roman legislator enacted laws without reference to their application in

43. The above is a condensed statement of Westlake's note to the Institute of International Law. See 18 *Annuaire* 35–40. See also, Westlake, *Private International Law* (4th ed.), 25–40.

44. For example, the majority of an Englishman domiciled in Italy would have to be determined in Germany (*lex patriæ*) by the German law relating to majority, for the reason that both England (*lex domicilii*) and Italy (*lex patriæ*) would be deemed to have declined jurisdiction.

Buzzati gives another illustration: Suppose, he says, State A applies the *lex rei sitæ* to immovables, the *lex domicilii* to movables, and the *lex loci actus* to the form of wills. The law of B is the same except that the national law of the deceased shall govern the distribution of his movables. A subject of State A dies domiciled in State B, leaving a will executed in B. His estate is composed of movables and of immovable property situated in State B. A judge of A has to decide in regard to the disposition of his estate. The law of B concerning testamentary and intestate succession being proved, the judge would apply its provisions regarding the form of the will and those relating to the immovable property, but when he came to the movable property, he would have to assume that there was a gap—that is, that the provisions of State B regarding the distribution of personal property do not exist. 8 Niemeyer 455.

space. As to the modern continental countries, notwithstanding the fact that the science of Private International Law has been known to them since the fourteenth century, their present codes, almost without exception, contain such scant provisions relating to the Conflict of Laws that an assertion that the legislator in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law is an absurdity. In most instances no such rule of Private International Law could be found in any law. And with respect to England and the United States the unsoundness of Westlake's contention is all the more apparent for the reason that the law of England was fully developed before the rules relating to the Conflict of Laws, taken over from the continent, became a part thereof. With what show of reason can it be said then that the two are one and inseparable? ⁴⁵ Laws are enacted by a legislator without any thought of their operation in space.⁴⁶ The object of the science of the Private International

45. Bate, in his Notes on Renvoi 87-107, maintains the following thesis: "When once a jural relation, or an element therein, is perceived to be outside the dominion of the [territorial] law of England, it is deemed by English courts to be in the dominion of International Law, and not in the dominion of any other legal system."

46. Kahn, 30 Ihering's *Jahrbücher für die Dogmatik* 29-30, has attempted to show that in comparison with the rules of internal law those of Private International Law possess ordinarily a subordinate character.

According to the same writer the thought of the legislator in directing the application of foreign law is about as follows: "Though I regard my law as the better and the more reasonable, it is generally more important to aim at international uniformity of treatment even at the risk that objectively the result is not so good. If we should desire to apply our law exclusively in those cases also in which the legal relationship has a much more important connection with foreign countries the advantages gained from the application of our better law would be out of proportion to the disadvantages with respect to international uncertainty of law resulting therefrom. * * * Just as I treat foreign law, so shall I also be treated in general. If I expect and demand that my law shall be taken into consideration by other countries, I must as far as possible admit the application of foreign law in analogous cases.

"We see therefore that the rule of Private International Law, however closely it may be connected with the rule of substantive law, is nevertheless by no means a pure expression of the applicability of our law; that the legislator establishing a certain point of contact for his Private International Law is far from asserting that he has no substantive law for other cases.

"The legislator determining the right of succession according to the domicile of the deceased says merely: 'For me domicile is a more important point of contact than nationality or any other principle. I would gladly apply my rules concerning succession also to my subjects residing abroad, to all property situated in my territory, etc. Yet I know that if I want to aim at international uniformity of law I can claim, on principle at least, but one point of contact. That being so, I prefer to assure the

Law of a particular country is to fix the limits of the application of the territorial law of such country, but its aim is not restricted to this. It includes also the determination of the foreign law applicable in those cases in which the *lex fori* does not control. Otherwise the courts of the forum would be left by the national legislator without a guide as to the applicatory law in that class of cases. Nor can the application of the territorial law of a foreign country be made dependent upon the wishes of the foreign legislator. If its enforcement rested upon mere comity or courtesy to such foreign State and not upon considerations of justice and international convenience, the substitution of the *lex fori* for a foreign law which did not care to govern, might be regarded as a voluntary withdrawal of an offer or unappreciated courtesy extended to such foreign country rather than as resulting from the commands of the foreign sovereign.⁴⁷ But, inasmuch as the application of foreign law under modern conditions has become a jural necessity,⁴⁸ it follows, in

strict application of my rules concerning succession as to those who live in my territory. I will rather suffer an application of foreign law to my subjects abroad than to admit its application to persons domiciled within my territory.' "

40 Ihering's *Jahrbücher für die Dogmatik* 67-68.

47. See Weiss, 18 *Annuaire* 151. (Why not accept the gift when the foreign law yields to the *lex fori*? Why be more of a royalist than the king?); 1 Rolin, *Principes du droit international privé* 259. (Why be more catholic than the pope?)

48. Savigny, *Private International Law* (Guthrie's transl.), 27-29; Lainé, *Introduction au droit international privé* 19-44.

The old theory of comity or courtesy, first propounded by the Dutch jurists, Huber and Voet, and accepted in England as the basis of its Conflict of Laws, has given way there, as well as in the United States to-day, to that of jural necessity.

Courts resort to the law of another country "not *ex comitate*, but *ex debito justitiæ*." Lord Brougham in *Warrender v. Warrender* (1835) 2 Cl. & F. 488, 530.

"The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners." Dicey, *Conflict of Laws* (2d ed.), 10-11.

"The true foundation on which the administration of International Law must rest is, that the rules which are to govern are those which arise from the mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." Story, *Conflict of Laws* (8th ed.), sec. 35.

"Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard

view of the absence of a common superior, that each sovereign State, in accordance with its own sense of duty, both to its own inhabitants and to the rest of the world, must designate the law which, based upon the nature of things, shall settle the controversy.⁴⁹ To leave the final decision of a case to a foreign lawgiver means, in reality, nothing less than an abdication of sovereignty and a failure on the part of a State to discharge the duties owed to its inhabitants.⁵⁰ As a result it may happen that the courts of one State will determine the rights of litigants with reference to the law of a foreign country when such country itself would not so determine them. But, unfortunate as this is, it will happen whether *renvoi* is adopted or not, as long as there are differences in the rules of Private International Law.

A number of authors have advocated *renvoi* in the belief that it would tend toward greater international harmony in the law—the ultimate aim of the science of Private International Law.⁵¹ Such an assumption, however, is unwarranted. Suppose, again, that A, a citizen of the United States, formerly a resident of New York, dies domiciled in Italy, and the question as to who is entitled to his personal estate left in New York arises before a New York judge. If *renvoi* is rejected the New York judge would distribute the property, of course, according to the Italian statute of distributions (*lex domicilii*). The Italian courts, on the other hand, by reason of their principle of nationality, would apply the New York statute of distributions.

both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Mr. Justice Gray in *Hilton v. Guyot* (1895) 159 U. S. 113, 163–164.

49. "*Renvoi*, in effect, in whatever manner it be understood, involves the influence, more or less direct and effective, of the state whose law is declared applicable upon the international law of the state which declares it applicable." Lainé, 3 Darras, 332.

The argument that the foreign law, having jurisdiction under the *lex fori*, has created rights which must be recognized involves in effect a *petitio principii*. The very question is whether the *lex fori* should recognize alleged rights created not by the territorial law of the foreign country referred to, but by that of another state which is incompetent under the *lex fori*.

50. Audinet, S. 1899, 2, 105; Bartin, 30 *Revue de droit international et de législation comparée* 295; Bustamante, 17 *Annuaire* 220; Catellani, 18 *Annuaire* 170; Chrétien, 13 *Clunet* 174 n. 2; 1 Gierke, *Deutsches Privatrecht* 214; Klein, 27 *Archiv für bürgerliches Recht* 273; Labbé, 12 *Clunet* 12; Lainé, 23 *Clunet* 256; 3 Darras, 334–335; Laurent, S. 1881, 4, 42; Olivi, *Revue de droit international et de législation comparée*, 1900, pp. 31–32; Pic, D. 1899, 2, 410; Pillet, *Droit international privé* 241–242.

51. Chausse, 24 *Clunet* 23; *Revue critique de législation et de jurisprudence* 1888, p. 197; 1 Dernburg, *Das bürgerliche Recht* 103; 2 Vareilles-Sommières, *La synthèse du droit international privé* 98; 3 Weiss, *Traité de droit international privé* 81; 18 *Annuaire* 151.

If *renvoi* is adopted, the New York courts would apply the New York statute of distributions and the Italian courts the Italian statute.⁵² There is no identity of result.⁵³ Each country has simply been forced to distribute the property according to a statute which, in the nature of things, it deemed inapplicable. *Renvoi* or no *renvoi*, such inconsistencies will remain. Uniformity of decision cannot be obtained until the elimination of the differences in the systems of Private International Law through international agreement.

It follows that whenever the question as to the creation of rights under the law of a foreign country arises before the tribunals of another State the existence or non-existence of such rights depends, properly speaking, not upon the will of the foreign lawgiver, but upon the *lex fori*, which must be deemed to have adopted the foreign internal or territorial law for the purpose.

It may thus be said that *renvoi* is insupportable in theory, and that it offers no real advantage to recommend its adoption on grounds of expediency. Courts that have sanctioned *renvoi* seem to have done so as a convenient means to escape the necessity of applying foreign law, a task often of considerable difficulty, but they have forgotten that this apparent gain, even if Westlake's theory were adopted, can be had only after proof of the existence of a different rule governing the Conflict of Laws in the foreign country. The burden upon the judge would, in fact, be increased and not diminished, for he would be obliged, to some extent at least, to acquaint himself with the rules of Private International Law prevailing in foreign countries.⁵⁴ Concerning our own conflict of Laws, it has been said by Mr. Justice Porter in *Saul v. His Creditors*,⁵⁵ that the questions

52. This statement is based upon the actual decisions in the various countries with regard to *renvoi*. If the rules of Private International Law of both New York and Italy should compel the local judge to regard himself as sitting in the foreign country we should have the same result as if *renvoi* were no part of the law of either country.

53. That *renvoi* will not promote the execution of foreign judgments has been shown by Bartin, 30 *Revue de droit international et de législation comparé* 139-157. See also, Bartin, D. 1888, 2, 28; Buzzati, 18 *Annuaire* 152.

54. The extent would depend upon the theory adopted by the courts. Should Westlake's theory prevail, the *lex fori* would become applicable upon mere proof that the corresponding rule governing the Conflict of Laws in the foreign country was different from that of the forum. If *renvoi* in the stricter sense, inclusive of *Weiterverweisung*, obtained, the judge of the forum might be compelled, according to circumstances, to investigate the Private International Law of several countries, and to decide the case after all, not according to the *lex fori*, but according to the internal or territorial law of some foreign country.

55. (La. 1827) 5 Martin (N. S.) 569.

relating thereto "are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice." How hopelessly embarrassing would they become if the additional burden of applying the Private International Law of any country of the civilized world were placed upon the shoulders of our judges? ⁵⁶

II. *RENOI* IN PARTICULAR CLASSES OF CASES

It has been intimated that *renvoi* might be allowed as an exceptional doctrine with respect to the *lex domicilii*. The theory suggested is that since the adoption of the *lex domicilii* in the Conflict of Laws arose from a desire that the rights governed thereby be subject to one law⁵⁷—an aim impossible of realization after many countries have gone over to the *lex patriæ*—courts still adhering to the old rule would be justified in interpreting the same in a *renvoi* sense.⁵⁸ This conclusion, however, is inadmissible. Could the question be examined *de novo*, English and American courts, for example, might hold, in view of their tendency to subject transfers of personal property *inter vivos* to the *lex rei sitæ*,⁵⁹ that the same rule should govern its distribution upon death. But as long as the *lex domicilii* is retained as the general principle⁶⁰ a substitution of the *lex fori* for the foreign law upon the sole ground that the foreign country had become a convert to the *lex patriæ* could be supported neither upon principle nor upon grounds of policy.⁶¹ The objec-

56. The fundamental nature of the differences in their systems of Private International Law and especially the uncertainty of their rules relating to public policy make the application of foreign law as a whole practically an impossible task.

57. There is considerable doubt in regard to the origin of the rule *lex domicilii* in the matter of succession. See *Harvey v. Richards* (1818) 1 Mason, 381, *per* Story, J.; *Thorne v. Watkins* (1750) 2 Ves. 35 (Lord Hardwicke); Meili, International Civil and Commercial Law 372-374; v. Bar, Private International Law (Gillespie's transl.) 792-806.

58. See Sewell, 3 Darras 517, 524.

59. *Cammell v. Sewell* (1860) 5 Hurl. & N. 728; *Green v. Van Buskirk* (1866) 5 Wall. 307; (1868) 7 Wall. 139; *Lees v. Harding Whitman & Co.* (1905) 68 N. J. Eq. 622; *Schmidt v. Perkins* (1907) 74 N. J. Law 785.

60. It is evident that a country like the United States, in which there is no uniform law of succession, cannot, as long as such condition lasts, adopt the *lex patriæ* intra-territorially.

61. Professor Meili, of the University of Zurich, has suggested that *renvoi* might be adopted in the above class of cases by countries still adhering to the *lex domicilii* as a legislative measure of retorsion with a view of checking the encroachments of the *lex patriæ*. (*Das internationale Privatrecht und die Staatenkonferenzen in Haag*, 30-31). It is difficult to see, however, even if the propriety of retorsion in the Conflict of Laws were conceded, how it would, in this instance, accomplish any beneficial

tions raised against *renvoi* in general apply with full force to this class of cases.⁶²

Article 27 of the Law of Introduction to the German Civil Code, which went into effect on January 1, 1900, provides for the application of German law whenever in matters relating to capacity, marriage, matrimonial property, divorce, and succession, the foreign law refers back to German law. According to Article 28 of the same law, Article 27 is inapplicable to property situated in a third State where different rules prevail.

Renvoi has thus been expressly sanctioned by the German legislator with respect to all matters based upon the principle of nationality, in so far as they have been regulated in the Code, provided the foreign law refers back to German law.⁶³ The reasons for the final adoption of *renvoi* in the form contained in the above articles are enveloped in doubt and obscurity. In the preliminary draft, in which substantially the same provisions are found (section 31), the following is stated:

"The draft starts with the principle that foreign law is applied in Germany not for the reason and to the extent that it wants to be applied, but for the reason and to the extent that its application corresponds to the spirit of our own law. The present section by way of exception takes account of the wishes of the foreign law in so far as the latter does not care to be applied in cases, properly subject to such foreign law by reason of the principle of nationality, if accord-

result. The doctrine of *renvoi* would, in fact, lead to the enforcement of the *lex patriæ* when, without such a doctrine, the *lex fori* would have prescribed the application of the *lex domicilii*.

62. Westlake advocated *renvoi* before the Institute of International Law at its session at the Hague with respect to the above class of cases only. 17 *Annuaire* 31, 217-219. Although the *lex domicilii* differs from the other rules of the Conflict of Laws in that it is based upon the personal tie existing between a country and all persons domiciled therein notwithstanding their absence from its territory at the time of the creation of the right or rights in question, it is apprehended that no distinction can be drawn between them with regard to the question of *renvoi*. Upon further reflection Westlake abandoned his former position in favor of the general application of *renvoi*. 18 *Annuaire* 35-40.

63. Whether or not Article 27 should be regarded as containing a general principle applicable also to those branches of the law not resting upon the *lex patriæ* and to include *Weiterverweisung* is a mooted question among the German jurists and has not been definitely determined by the German courts. It is contended by some that the actual provisions of the Code were intended merely as illustrations of a general principle. Others, with more reason, contend in favor of a restrictive interpretation. See Kahn, 45 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 618; Niemeyer, *Das Internationale Privatrecht des bürgerlichen Gesetzbuchs* 79-86; 6 Planck, *Bürgerliches Gesetzbuch* 106-108. Compare, v. Bar, 8 Niemeyer 188; v. Bar, 2 Holtzendorff's *Encyklopadie der Rechtswissenschaft* (6th ed. by Kohler) 20; Keidel, 26 *Clunet* 19.

ing to the principles of Private International Law adopted by it, German law and not its own law is to be applied. This provision is to be recommended on the one hand because it diminishes conflicts with the *lex domicilii*, and on the other hand because, without violating the aforesaid principle, it assigns to German law a wider sphere of operation, which will promote the security of legal intercourse at home." ⁶⁴

The first commission after a thorough discussion of the problem pronounced itself against the adoption of Section 31, or of *renvoi* in any other form. The same attitude was maintained by the second commission. By way of exception it allowed a qualified *renvoi* in two cases where expediency strongly suggested its adoption: (1) a marriage invalid under the national law of the parties was nevertheless to be valid if the requisite capacity existed under the *lex domicilii* or the *lex celebrationis*, and sanction for such a marriage could be found in the national law of the parties; (2) a divorce obtained in accordance with the *lex domicilii* of the husband but not in accordance with his national law was to be valid if upheld by his national law. For reasons so far undisclosed, the Federal Council struck out these provisions and adopted the principle contained in the original draft.⁶⁵ Whether or not *renvoi* in the form it has received in Article 27 became a part of German law as a result of political considerations, owing to the participation of the Foreign Office in the deliberations of the Federal Council, as Kahn intimates,⁶⁶ the fact remains that it reflects neither the opinion of the Court of the Empire at the time⁶⁷ nor the juristic sentiment of Germany as a whole.⁶⁸ The reasons advanced in the original draft are without merit. The first one, viz., that the adoption of *renvoi* will diminish conflicts is not true, as has been shown above. The second, viz., that from an extension of the *lex fori* greater security of law for the German people would result is broad enough to exclude the application of any foreign law. If political considerations induced the adoption of Article 27 of the German Code, in order to give Germany a position of vantage in its effort to remove conflicts by international agreement,

64. Kahn, 36 Ihering's *Jahrbücher für die Dogmatik* 370.

65. See 1 Mugdan, *Die gesammten Materialien zum bürgerlichen Gesetzbuch für das deutsche Reich* 261-263; 6 Planck, *Bürgerliches Gesetzbuch* 104. The deliberations of the Federal Council, which appear to have been but summary, have not as yet been published. See Kahn, 36 Ihering's *Jahrbücher für die Dogmatik* 399.

66. 36 Ihering's *Jahrbücher für die Dogmatik* 399.

67. See *supra*, p. 22.

68. See *supra*, p. 24.

it is still to be regretted from the standpoint of the science of Private International Law.⁶⁹

Article I of the Convention of The Hague relating to marriage, and signed by various continental countries on June 12, 1902, contains the following provision:

"The right of contracting marriage shall be governed by the national law of each of the parties intending to marry, unless a provision of such law refers expressly to some other law."⁷⁰

But for the word "expressly" no doubt could possibly be entertained in regard to the meaning of this article and its attitude toward *renvoi*. As it stands it would seem clearly to allow *renvoi* in some sense. The history of this article,⁷¹ however, shows that it was not the intention of its authors to sanction *renvoi* in the ordinary sense. They wished merely to provide for cases that might arise under statutes similar to the Swiss Federal Law of Dec. 24, 1874, relating to marriage. Articles 25 and 54 of this law recognize the validity of a marriage entered into by Swiss subjects abroad if it complies either with Swiss law or with the law of the place of celebration. Though the Convention required for the validity of a marriage conformity with the national law of the parties it seemed that where a national law like that of Switzerland expressly sanctioned an alternative standard for the validity of a marriage by its subjects abroad, a marriage conforming to such alternative provision should be upheld. This is not ordinary *renvoi*, which implies a conflict in the rules of Private International Law. Switzerland does not apply in its Conflict of Laws relating to marriage the *lex loci* in the place of the *lex patriæ*; it has only provided by express legislation that its subjects *may* marry abroad upon complying with the local law. The reference provision of the above article, therefore, does not relate to the general rules governing the Conflict of Laws with respect to

69. For a more extended discussion of Article 27 see, Bartin, 30 *Revue de droit international et de législation comparée* 159-170; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*; Planck, *Bürgerliches Gesetzbuch* (3d ed.), VI, 103-108.

70. *Actes de la Conférence de la Haye chargée de réglementer diverses matières de droit international privé*, III, p. 168.

71. For the history of this article see *Actes de la Conférence de la Haye*, etc., I, pp. 39-41, 45-50; II, pp. 43, 47-49; III, pp. 160-161; 167-170. See also Lainé, 21 *Clunet* 247-257; 22 *Clunet* 470-471; 23 *Clunet* 14-15; 5 *Darras* 24-33; I Buzzati, *Trattato di diritto internazionale privato secondo la Convenzione dell' Aja*; *Il Matrimonio* 105-120; Kahn, 12 *Niemeyer* 209-217; 36 *Ihering's Jahrbücher für die Dogmatik* 383-397.

marriage under the national law, but merely to such exceptional express legislative enactments as the one contained in the Swiss law. The members of the commission that drafted the Convention relating to marriage, as stated by its chairman Renault,⁷² were opposed to *renvoi* upon principle and had no intention of sanctioning its general application. Some members of the Conference may have shared Asser's view⁷³ that *renvoi*, although indefensible upon principle, should be adopted in international conventions based upon the *lex patriæ* in order to extend their beneficial influence to countries still following the *lex domicilii*, which but for such provision would not adhere to the Convention—a view scarcely justified by subsequent events—but if the general sentiment of the Conference had been in favor of *renvoi* upon this ground it would no doubt have been adopted in some of the other Conventions agreed upon. The reference provision in Article 1 of the Convention relating to marriage must be regarded, therefore, as a special rule adopted for the purpose of giving marriage an additional chance of validity.⁷⁴

v. Bar has suggested a line of cases in which he says *renvoi* is indispensable to avoid unjust results.⁷⁵ He puts, in substance, the following cases:

(1) Two subjects of State X are married in State Y, where they are domiciled. The validity of the marriage is questioned in State Z on the ground that the parties had no capacity to enter the marriage under the provisions of the laws of Y relating to marriage, though it is conceded that they possessed such capacity under their national law with respect to marriage. The laws of X and Y agree that the *lex patriæ* shall govern the essentials of a marriage. The law of Z, on the other hand, applies the *lex domicilii*. Should the courts of Z regard the marriage as valid?

(2) A, a citizen of State X, dies domiciled in State Y. The laws of X and Y agree that B is entitled to A's personal estate in accordance with A's national law. Subsequently B's heirship is contested in State Z, in which State the *lex domicilii* is held

72. *Actes de la Conférence de la Haye, etc.*, III, p. 169.

73. 32 *Clunet* 41-42.

74. "It implies a concession to the theory called '*renvoi*.' But, aside from the fact that concessions may be legitimately made in an international convention to theories which scientifically one does not approve, this one is very slight; it is indeed beneficial since it consists in a deference on the part of states to the desire manifested by other states that the marriage of their subjects abroad shall have all possible chances of validity." Lainé, 28 *Clunet* 15-16.

75. 8 *Niemeyer* 183-184.

to govern the distribution of personal property upon death. Should B's title be recognized by the courts of Z?

v. Bar would answer both questions in the affirmative upon principles of *renvoi*. He formulated the rule applicable to the above cases in the following thesis which he submitted to the Institute of International Law:

A court must respect: "The decision of two or more foreign legislations, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same legislation."⁷⁶

A resolution of similar import was introduced before the Institute of International Law by an opponent of *renvoi*, Professor Streit of the University of Athens.⁷⁷ In view of the observation, however, that this resolution involved in fact a proposition quite distinct from *renvoi*, to wit, what effect should be attributed to conventions between, or identical legislation on the part of, two countries by another State, it was agreed by the members of the Institute to make this a special topic for future consideration.⁷⁸

It is not proposed to examine the above cases nor any other special class of cases to which *renvoi* or something akin might perhaps with propriety be applied.⁷⁹ The sole object of this article is to deal with the general aspects of the question.

III. *RENOI* AS A PART OF ENGLISH AND AMERICAN LAW

We are now ready to inquire to what extent, if any, *renvoi* has become an established part of the common law, and to discuss, first, the English decisions which lend most support to the doctrine.

In *Collier v. Rivaz*⁸⁰ certain codicils to a will made by an Eng-

76. See 18 *Annuaire* 41.

77. 18 *Annuaire* 164.

78. See 18 *Annuaire* 178. See also Kahn's observations in regard to this question in 45 *Kritische Vierteljahresschrift für Gesetzgebung* 622-623.

79. Bartin has considered this question with regard to three special classes of cases: (1) with respect to consular jurisdictions; (2) with respect to countries like Switzerland, where the national legislator may have prescribed in particular instances the application of the law of a particular canton or State; (3) with respect to countries bound by international conventions in the matter of Private International Law. See 30 *Revue de Droit International et de Législation Comparée* 283-300.

80. (1841) 2 Curt. Ecc. 855, 862, 863. Other English cases upholding foreign wills by interpreting the rule of Private International Law re-

lishman whose domicile at the time of his death, in the English sense, was in Belgium, but, in the Belgian sense, was in England, were opposed in the Prerogative Court of Canterbury on the ground that their execution was not in the form required by Belgian law of Belgian subjects. Upon proof that these codicils would be upheld by the courts of Belgium, Sir Herbert Jenner admitted them to probate. The learned justice said :

"Then according to the opinion of these gentlemen, well skilled in the practical application of the Code Napoleon and its dispositions, and which was the law in force in Belgium up to the year 1830, when the separation of the two countries took place, and consequently at the time at which these testamentary documents of Mr. Ryan were executed, they do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium, as to the form and execution of a will, as would necessarily be the case with a free, natural-born subject of Belgium; but the successions of persons who, however long they might have been resident, not having obtained the royal authority to reside there, being considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the Courts of Belgium, if those Courts were called on to decide. *The Court sitting here decides from the evidence of persons skilled in that law, and decides as it would if sitting in Belgium.*

"Therefore I am of opinion, that notwithstanding the domicile of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicile, and had acquired *animo et facto* a domicile in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition, if executed according to the forms required by his own country. I am therefore of opinion, that I am bound to decree probate of the will and all the codicils."

This case appears to sanction *renvoi* in its extreme form. Though under the facts of the case English law became applicable, logic would demand that the direction of the foreign law be followed in all cases irrespective of the fact whether it led in the end to the application of the *lex fori* or to that of another country. Actually the case decides only that a will, invalid as to form under the English rules of Private International Law, will be admitted to probate in England if it conforms to the *lex domicilii* inclusive of its rules governing the Conflict of Laws. Such a decision was quite natural at a time when the Court of Delegates had just laid down the narrow and misconceived rule that a will, in the matter of form, *must* comply with the *lex*

lating to the formal validity of wills in a *renvoi* sense are: *Frere v. Frere* (1847) 5 Notes of Cases 593; *Crookenden v. Fuller* (1859) 1 Sw. & Tr. 441, *obiter*; In the Goods of Brown-Séguard (1894) 70 L. T. (N. S.) 811, *ex parte*.

domicilii at the time of the testator's death.⁸¹ This rule has since been changed by the English Wills Act,⁸² which has brought the English law into harmony with that prevailing on the continent, so that to-day the above codicils would be valid under the English rules of Private International Law. These considerations detract somewhat from the authority of this case.⁸³

In *In the Goods of Lacroix*⁸⁴ the question arose again with respect to the formal validity of a will, but this time under the English Wills Act. The will and codicils in the case were executed in Paris in the English form by a born Frenchman who had subsequently acquired the British nationality. The testator's domicile at the time of the making of the will was probably in France. Upon the affidavit of a French advocate that the instruments would be held valid by the French courts, Sir J. Hannen admitted them to probate as valid according to the law of the place where made.

In this case, therefore, the rule *locus regit actum* under the English Wills Act is taken to refer to the foreign law in its totality. But, as the application for probate was *ex parte*, and the real point in question was simply assumed, not considered, the case is not entitled to any weight.

In the case of *In re Trufort*,⁸⁵ a British subject by birth, who had acquired the Swiss nationality, died domiciled in France, leaving personal property in England, Switzerland and Italy, which he bequeathed to defendant. Plaintiff claimed nine-tenths of the estate as his compulsory portion as testator's lawful son under a judgment rendered by the courts of Zurich in accordance with the Zurich law of succession. The competency of the Zurich courts in the matter was recognized by the terms of a treaty between France and Switzerland. Stirling, J., held that the judgment was conclusive upon the English courts.

This case has been cited in support of the doctrine of *Weiter-*

81. *Stanley v. Bernes* (1830) 3 Hagg. 447. See also *Craigie v. Lewin* (1842) 3 Curt. Ecc. 435; *De Zichy Ferraris v. Hertford* (1843) 3 Curt. Ecc. 468; *affd. Croker v. Hertford* (1844) 4 Moo. P. C. 339; *Bremer v. Freeman* (1857) 10 Moo. P. C. 306; *Moultrie v. Hunt* (1861) 23 N. Y. 394. The English law was in a state of doubt prior to this time. It had been held that a will executed by an Englishman abroad might be in the English form. *Duchess of Kingston Case*, cited in 2 Add. 21; *Curling v. Thornton* (1823) 2 Add. 6.

82. 1861, St. 24 & 25 Vict., c. 114. In various States of this country also the rule that in formal respects a will must comply with the law of domicile at the time of death has been changed by statute.

83. See also, *Bate*, Notes on Renvoi 109-111; *Abbott*, 24 Law Quart. Rev. 142-144.

84. (1887) L. R. 2 P. D. 94.

85. (1887) L. R. 36 Ch. D. 600.

verweisung.⁸⁶ In reality, it stands only for the limited proposition submitted to the Institute of International Law, and regarded by its members as distinct from *renvoi*,—to the effect that where the law of the State in which a party has a domicile and the law of the country of which he is a subject agree that the law of one of them is to govern, the rights created by such law should be enforced or recognized in all jurisdictions in which either the *lex domicilii* or the *lex patriæ* is regarded as the proper rule.⁸⁷

The case of *Armitage v. The Attorney-General*⁸⁸ involved the validity of a divorce procured in South Dakota by a married woman under circumstances which would give that court no jurisdiction according to English law, but proved to be sufficient under the law of New York, the State in which the husband was domiciled. It was held that inasmuch as the courts of the State of the husband's domicile would recognize the decree in this instance, the divorce should be deemed valid in England, notwithstanding the English rule that the courts of the State in which the husband has his domicile shall be regarded as having exclusive jurisdiction for divorce.

The doctrine of this case again, if supportable at all, may properly be regarded as limited to cases of marriage or divorce and as applicable to them only where, as the result of such application, the marriage or divorce will be sustained. It will be remembered that the second commission for the preparation of the German Civil Code, which rejected *renvoi* in general, sanctioned it upon grounds of expediency in the cases and for the purpose just mentioned.

The first English case in which the question of *renvoi* was actually considered was that of *In re Johnson*.⁸⁹ The facts, in brief, were as follows: Mary Johnson, a British subject, whose domicile of origin was Malta, died domiciled in the Grand-Duchy of Baden, Germany, leaving personal property in Baden and in England. The litigation related to the distribution of the movable property left in England which was undisposed of by will. It was proved that under the Baden law, the law of the country of which the deceased was a subject at the time of her death, would govern.⁹⁰ Farwell, *J.*, held that the statute of dis-

86. Dicey, *Conflict of Laws* (2d ed.) 718-719; Westlake, *Private International Law* (4th ed.) 38-39, 104.

87. For an explanation of the case see also Bate, *Notes on Renvoi* 112; Abbott, 24 *Law Quart. Rev.* 142. The conclusions reached in this case find support in an interesting article by Schnell, 5 *Niemeyer* 337-343.

88. [1906] P. 185.

89. [1903] 1 Ch. 821, 827-8.

90. In this case, therefore, the issue of *renvoi* was squarely raised with respect to cases in which the *lex domicilii* comes into conflict with the *lex*

tributions of Malta, that is, of the domicile of origin, should govern, basing his conclusion upon two distinct lines of argument. The principal argument advanced was that Mary Johnson had not acquired a domicile in Baden, inasmuch as the Baden law attributed no effect to domicile, the learned court saying:

"In order to establish a new domicile of choice, the Court has to be satisfied that it has been adopted *animo et facto*—it is essential that there should be both *animus* and *factum*. When, therefore, the law of the land said to be chosen as the new domicile disregards domicile and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicile *de facto*; and the case is accordingly remitted to this Court as a case where the *propositus* has intended but has failed to obtain any effectual domicile of choice. No change is effectual unless the *factum* is proved, and the *factum* cannot exist in a country where the law refuses to recognize it. The result is that this Court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the *propositus*, therefore, is left with his domicile of origin unaffected. The Baden Courts would in effect have disavowed him and disclaimed jurisdiction."

In answer to this argument it is sufficient to remark that it disregards the prevailing rule, which is, that the question of domicile,—a mixed question of law and fact,—is to be determined in accordance with the law of the State in which the property affected is situated.⁹¹ Moreover, the court's assumption that the courts of Baden would have declined jurisdiction is erroneous in fact. Under Sections 13 and 27 of the German Code of Civil Procedure jurisdiction on the part of the Baden courts exists in matters of succession where the deceased was a resident of Baden at the time of his death.

The second line of reasoning, in the words of Justice Farwell, was as follows:

patriae. Abbott, in 24 Law Quart. Rev. 140–145, gives too restricted a meaning to *renvoi* when he considers cases in which there has been a reascertainment of domicile with reference to the foreign law as the only instance of true *renvoi*. The question of *renvoi*, as generally understood, is involved whenever the rules of Private International Law of the countries concerned differ.

91. *Collier v. Rivaz* (1841) 2 Curt. Ecc. 855; *Anderson v. Laneville* (1854) 9 Moo. P. C. 325; *Bremer v. Freeman* (1857) 10 Moo. P. C. 306; *Hamilton v. Dallas* (1875) L. R. 1 Ch. D. 257; *In re Martin* [1900] P. (C. A.) 227, *Lindley*; *Harral v. Harral* (1884) 39 N. J. Eq. 279. But see *In re Bowes* (1906) 22 T. L. R. 711.

"The Baden Courts would have really refused jurisdiction; but, even if this were not so, I should arrive at the same conclusion in a different way. When it is said that the Baden Courts regard the nationality of the *propositus*, I apprehend that this means that they distribute according to the law of the nation to which the *propositus* belongs, or in other words, of which he is a subject. But the British Empire is composed of a large number of States, countries, and colonies . . . [with] many different systems of law within its bounds. There is no one uniform law of this Empire which can be taken for this purpose as the law of the nationality of the *propositus*. To what nationality, then, does the *propositus* belong, or of whom is he a subject? The only possible answer appears to me to be that he is a subject of the British Crown, and that his nationality is the British Empire; but inasmuch as there is no one law of the Empire to which the rule in question can refer, resort must be had to the law of England. . . . Foreign States are in diplomatic relation with this country as representing the whole Empire. They know nothing officially of Scotland or Canada, or the Colonies, still less, perhaps, of the Channel Islands or the Isle of Man. . . . The only possible solution appears to me to be that foreign Courts must necessarily refer such questions as these to and decide them according to the law of the country with which alone they are in diplomatic relation; and inasmuch as the law of England distributes such movables in accordance with domicile of origin substantial justice is done to all His Majesty's subjects. . . . I conclude, therefore, that distribution according to the law of the nationality means according to English law, but according to that law as applicable to the particular *propositus*, and not to Englishmen generally without regard to their domicile of origin." ⁹²

In this second line of reasoning the learned court, like the Prerogative Court in *Collier v. Rivaz*, evidently intended to arrive at the conclusion which the Baden courts would have reached had the case been presented to them for adjudication, but no such course was actually pursued. Courts that have adopted the principle of nationality in their Private International Law are, of course, confronted with a difficulty when the party in question is a citizen or subject of a country which has no uniform legislation on the point in issue, as is usually the case with respect to Great Britain and the United States. The difficulty has been solved by them by the application of the law of that portion of the country in which the party concerned had his last abode.⁹³ Under the facts of this case the law of Malta would have become applicable. But if the learned court

92. [1903] 1 Ch. 821, 832-835.

93. Trib. Civ. Pau, Apr. 19, 1901 (29 Clunet 858); Trib. Civ. Seine, March 11, 1904 (34 Clunet 434); App. Paris, Aug. 1, 1905 (D. 1906, 2, 169); OLG Karlsruhe, Oct. 23, 1897 and RG Apr. 19, 1898 (9 Niemeyer 134).

deemed it its duty to decide the question as if it were sitting in Baden, it should have inquired whether *renvoi* was a part of the Baden law, for the courts of Baden would be justified in distributing the property in accordance with the Maltese statute of distributions only in the event that they understood their *lex patriæ* to refer merely to the internal law of the foreign country. But if they understood their rules governing the Conflict of Laws as referring to foreign law in its totality, and finding that the Maltese rule of Private International Law on the point in question (*lex domicilii*) called for the application of the law of Baden, they would have followed such reference and distributed the property in accordance with the provisions of their own law.⁹⁴ The statement, moreover, that the English law would distribute such movables in accordance with the law of the domicile of origin is incorrect. The *lex domicilii* at the time of death is the clearly established law in this regard. Upon the false assumption that no domicile had been acquired in Baden the domicile of origin would have remained, of course, unchanged in this particular case. But if the deceased had established a domicile in another part of the British Empire or in a foreign country before going to Baden, the result reached by application of the law of domicile of origin would not have been identical with that of the Baden courts, under the *renvoi* theory or in the absence of such theory, had the case come before them for decision.

In view of the erroneous and confused reasoning of the case and its disregard for established rules of English law, *In re Johnson* lends little, if any, support to *renvoi*.

Renvoi came before Mr. Justice Farwell in another case, *In re Baines*, decided March 13, 1903. The case is unreported, but Dicey gives the following statement of it:

"A British subject probably, but not certainly, domiciled in England, was possessed of land in Egypt. He died leaving a will valid in form according to the law both of England and of Egypt. His Egyptian land was sold by his executors. The proceeds (£16,000) were lodged in a bank in England. The dispositions of the deceased's will were valid according to the law of England, but invalid according to the local or territorial law of Egypt. It was admitted on all hands that the right of succession to the £16,000 depended upon the right to succession to the Egyptian land. But succession to land is under

94. The law of Baden at the time was adverse to *renvoi*. OLG Karlsruhe, Oct. 23, 1897 (9 Niemeyer 134). See also Kahn, 30 *Ihering's Jahrbücher für die Dogmatik* 12; Kahn, 36 *id.* 406. Had Mrs. Johnson died since January 1, 1900, Art. 27 of the Law of Introduction to the German Civil Code would have compelled the Baden judge to make the distribution in accordance with the provisions of the German Code relating to succession.

the Egyptian Code Civil, Arts. 77, 78 'governed by the law of the nation to which the deceased belongs.' The meaning of the article was disputed. The evidence of experts was taken: it was by this means proved that the Egyptian courts would hold that in the circumstances of the case succession to the deceased must, under the articles of the Egyptian Code, be governed by the ordinary territorial law of England. The will was held valid."⁹⁵

It is apparent from the above statement of the case that the Egyptian law, applicable as the *lex rei sitæ*, was referred to in its totality by the English law.

Advocates of *renvoi*, it must be admitted, find support for their views in the cases so far discussed. Liberally construed, the cases would establish *renvoi* as a part of the English law in the sense of *Collier v. Rivaz*, in a more radical form than that assigned to it in any other country either by the courts or jurists. They would seem to sanction *Weiterverweisung* (*In re Truport*) as well as *renvoi* proper, and to require an application of this doctrine not merely to cases in which the *lex domicilii* and the *lex patriæ* are in conflict, but also to all other cases, whatever the rule of Private International Law involved in regard to which differences may exist in the countries concerned (*In the Goods of Lacroix*, *In re Baines*).

The contention has been made⁹⁶ that the law of England has been settled to the contrary by *Bremer v. Freeman*,⁹⁷ decided by the Court of Appeal. But this view is erroneous. The question in that case related to the formal validity of a will, disposing of personal property in England, which had been executed in the English form in Paris by an Englishwoman, who was domiciled in France in the English sense but not in the French sense, for want of governmental authorization.⁹⁸

After having found that in accordance with the English law regarding domicile the testatrix had acquired a domicile in France, Lord Wensleydale continued:

"This domicile being established in evidence, the burden is thrown on the Respondent to prove that the Will, in the English form, is sanctioned by the municipal law of France. He must show, upon the balance of the conflicting evidence in the cause, that the Wills of persons so domiciled, in that form, are allowed by that law."

The learned justice thereupon reviewed the testimony of French experts regarding the meaning of Article 13 of the French Code and the French rules of Private International

95. Conflict of Laws (2d ed.) 723.

96. Abbott, 24 Law Quart. Rev. 143-146.

97. (1857) 10 Moo. P. C. 306, 361.

98. See Article 13, French Civil Code.

Law with respect to the formal validity of wills; and upon such testimony, and a personal investigation of the decisions of the French courts in regard to the meaning of Article 13, he concluded, (1) that Article 13 did not deprive foreigners not so domiciled of the power to make a will; (2) that under the law of France the will in the English form was invalid.

That the learned court must have understood by the "municipal" law of France French law in its totality and not merely its territorial law appears from the fact that only a rule relating to the Conflict of Laws could sanction a will executed in France in the *English* form. But inasmuch as the case turned principally upon the question of domicile and the meaning of Article 13 of the French Civil Code, the problem of *renvoi* not even being considered, and related, moreover, to the formal requirements of a will, in regard to which the English law, as a result of this decision⁹⁹ has since been changed, no great weight can be attached to it in its bearing upon *renvoi*.¹⁰⁰

Opposed to the preceding cases is *Hamilton v. Dallas*.¹⁰¹ In this case an Englishman domiciled in France in the English sense, but without having obtained an authorized domicile there,¹⁰² died intestate with respect to a part of his estate, and the question was whether the next of kin should be determined in accordance with the French statute of distributions, or in accordance with the English statute. After having determined that the deceased had acquired a domicile in France in the English, though not in the French, sense, Bacon, V. C., assumed as a matter of course that the French statute of distributions would govern. Had the learned judge regarded himself as sitting in France, the English statute should have been applied by virtue of the *lex patriæ* in the French system of Private International Law.¹⁰³

99. See Phillimore, Int. Law, IV, p. 226.

100. At the time of the rendering of this decision the French Court of Cassation recognized the optional character of the rule "*locus regit actum*" only with respect to Frenchmen executing their wills abroad. See Article 999, Civ. Code. Cass. March 9, 1853 (D. 1853, 1, 217). Very recently the optional character of the above rule has been extended to foreigners generally, so that they may now execute their wills in France, as far as form is concerned, by observing either the provisions of their national law or those of French law. Cass. Aug. 11, 1909 (36 Clunet 1097).

101. (1875) L. R. 1 Ch. D. 257.

102. Article 13, French Civil Code.

103. In the absence of treaty stipulations or of an authorized domicile in France the French courts would be required to apply the national law of the deceased. But inasmuch as they have sanctioned *renvoi* they would accept a reference back to French law. Cass. June 24, 1879 (1879, 1, 56); Cass. Feb. 22, 1882 (S. 1882, 1, 303); App. Grenoble, March 31, 1908 (35 Clunet 837). *Contra*: App. Pau, June 11, 1906 (D. 1907, 2, 1).

If we look beyond the cases calling for a determination of the question whether the foreign law should be understood in its totality we find certain decisions by the House of Lords which may be regarded as supporting, by implication, the doctrine that *renvoi* is a part of the English law. *Enohin v. Wylie*,¹⁰⁴ as explained by *Ewing v. Orr Ewing*,¹⁰⁵ established the rule that assets left in England by a person domiciled abroad may, after the satisfaction of local creditors, be distributed by an English judge according to the *lex domicilii*, or be handed over by the court to the foreign representative of the estate.¹⁰⁶ *Doglioni v. Crispin*¹⁰⁷ decided that when a deceased dies domiciled abroad a judgment by a court of the State of domicile declaring who is entitled to the personal estate will be regarded as final in England. Should the principles laid down in these cases govern when the rules of Private International Law of the foreign country differ from those of the forum, so that the rights to the succession would not be determined according to the territorial law of the domicile, *renvoi* would have become an established part of the law of England in so far as it relates to the *lex domicilii* in the law of succession. That such is the true import of the decisions was assumed in *Re Trufort*¹⁰⁸ by Justice Stirling with respect to *Doglioni v. Crispin*. But if, as has been shown in the first part of this article, the non-application of the territorial law of a foreign State pointed out by the rules governing the Conflict of Laws in the forum, in compliance with the wishes of the foreign country, constitutes in reality a violation of the principles of sovereignty and of the equality of independent States, such an assumption would be without foundation. Instead of remitting the English assets to the foreign court the English judge should make the distribution himself according to the territorial law of the country in which the deceased had his domicile. The decisions in *Enohin v. Wylie* and *Ewing v. Orr Ewing* rest upon the consideration that the courts of the domicile are in a better position to give a correct interpretation of the *lex domicilii* than are the courts of the forum.¹⁰⁹ But when it appears that the *lex domicilii*, on account of different rules of Private International Law, would apply either the *lex fori* or the law of another State no valid reason exists for yielding to

104. (1862) 10 H. L. C. 1.

105. (1883) 9 App. Cas. 34; (1885) 10 App. Cas. 453.

106. So *Harvey v. Richards* (1818) 1 Mason 381; *Lawrence v. Kitteridge* (1852) 21 Conn. 577.

107. (1866) L. R. 1 H. L. 301.

108. (1887) 36 Ch. D. 600.

109. See also *Hare v. Nasmyth* (1823) 2 Add. 25; *De Bonneval v. De Bonneval* (1838) 1 Curt. Ecc. 856; *Laneuville v. Anderson* (1860) 2 Sw. & Tr. 24.

such law. By a similar process of reasoning the application of *Doglioni v. Crispin* might be limited to cases in which the foreign court has determined the rights of the litigants according to its territorial law. Should such a restrictive interpretation, however, not be permissible in view of the established rules relating to foreign judgments, *Doglioni v. Crispin* would give no support to *renvoi*, but would disclose only the peculiar nature of the law governing judgments.

It would seem, therefore, that *renvoi* remains unaffected by *Enohin v. Wylie*, *Ewing v. Orr Ewing* and *Doglioni v. Crispin*.

Other cases holding, (1) that the distribution of personal property upon death shall be according to the statute of distributions existing under the law of the domicile at the time of death notwithstanding the fact that it was changed by subsequent retroactive legislation, valid in the State of domicile;¹¹⁰ (2) that the domicile of the deceased shall be determined according to the *lex rei sitæ et fori* irrespective of the law of the place of residence,¹¹¹ have been mentioned as opposed to *renvoi*.¹¹² But they are equally inconclusive. In the cases supporting the first proposition the English courts refused to make the distribution in the manner prescribed for the courts of the domicile. But even if *renvoi* were part of the common law these decisions could be sustained as exceptions to the rule. The rights of the next of kin having become vested at the time of death in accordance with the views of the *lex fori*, any attempt by the foreign legislator thereafter to divest them might be disregarded on grounds of public policy. The cases sustaining the second proposition have generally involved the peculiar provision of Article 13 of the Code Napoléon, which provides: "A foreigner authorized by decree to establish his domicile in France shall enjoy all civil rights." Whatever may be the effect of this article upon the status and rights of foreigners without an "authorized" domicile, it is recognized that such foreigners may have a domicile *de facto* in France.¹¹³ The difference between Anglo-American and French law consists then not in an inhibition on the part of the French law against the establish-

110. *Lynch v. Provisional Gov. of Paraguay* (1871) L. R. 2 P. & D. 268; *In re Aganoor's Trusts* (1895) 64 L. J. Ch. 521.

111. *Collier v. Rivaz* (1841) 2 Curt. Ecc. 855; *Anderson v. Laneville* (1854) 9 Moo. P. C. 325; *Bremer v. Freeman* (1857) 10 Moo. P. C. 306; *Hamilton v. Dallas* (1875) L. R. 1 Ch. D. 257; *In re Martin* [1900] P. (C. A.) 227 (Lindley); *Harral v. Harral* (1884) 39 N. J. Eq. 279. But see *In re Johnson* [1903] 1 Ch. 821; *In re Bowes* (1906) 22 T. L. R. 711.

112. *Abbott*, 24 Law Quart. Rev. 134-137.

113. *Bordeaux*, Aug. 19, 1879 (7 Clunet 586); App. Alger, Feb. 27, 1894 (21 Clunet 874); App. Paris, March 20, 1896 (23 Clunet 402); App. Paris, July 9, 1902 (30 Clunet 181).

ment by foreigners of a domicile in the Anglo-American sense, but merely in the fact that certain rights granted by French law are possessed by foreigners only after they have acquired an "authorized" domicile. These cases, therefore, are not opposed to *renvoi*. They have no direct bearing upon the question.

Can it be said in the light of the foregoing authority that *renvoi* has become an established part of the English law? Leading English writers have answered the question in the affirmative.¹¹⁴ It seems to the writer, however, that the actual case-law does not warrant such a broad and positive statement. With the exception of *In re Baines* and *In the Goods of Lacroix* the English cases holding that the reference was to the foreign law in its totality have involved only the *lex domicilii*. In this class of cases, as all opponents of *renvoi* would admit, the *renvoi* doctrine appears in its least objectionable form. No actual decision by a continental court nor legislative provision has extended *renvoi* to the *lex rei sitæ*, to the *lex loci contractus* or to any other rule of the Conflict of Laws, and scarcely a jurist can be found who would give it such a wide application. Whatever the merits of the question may be upon theory an extension of the doctrine beyond the *lex domicilii* (*lex patriæ*) has appeared impracticable. Nothing but clear and controlling authority can be deemed sufficient to establish *renvoi* as a *general* rule of the English law. If *In the Goods of Lacroix* and *In re Baines* represent the English law the validity of a contract entered into in Italy by two Frenchmen who are domiciled in Italy must be determined by the English courts according to the territorial law of France, since the law of Italy in its totality, presumably applicable under the English rules of Private International Law, would so direct (Dicey), or, if Westlake's view is correct, according to the territorial law of England (*lex fori*), inasmuch as there is disagreement between the English and Italian rules governing the Conflict of Laws with respect to contracts. The moment it is a recognized principle that the *lex loci*, as regards form, and the *lex rei sitæ* refer to the foreign law as a whole, it becomes impossible to contend that the other rules of Private International Law have a different meaning. It is submitted that the general application of *renvoi* in the English law will require for its support stronger authority than that afforded by *In the Goods of Lacroix* and *In re Baines*, the former an *ex parte* and the latter an unreported

114. Westlake, *Private International Law* (4th ed.) 25-40; Dicey, *Conflict of Laws* (2d ed.) 715-716; Piggott, *Foreign Judgments* (3d ed.) 11, pp. 261-264. See also, Brown, 25 *Law Quart. Rev.* 148, 153; 1 Williams on *Executors and Administrators* (7th Am. ed.) 440.

decision.¹¹⁵ It may be said, indeed, that even in its application to the *lex domicilii* in the law of succession *renvoi* is not as yet an *established* part of the English law. In none of the cases relating to *renvoi*, with the exception of *In re Johnson*, was the court aware of the problem. The equivocal meaning of the term "foreign law" misled both court and counsel, causing them to assume in each case that the *lex fori* referred to such law in its totality. The fundamental error underlying such an assumption has since that time been so clearly established by the leading jurists of the world, that, notwithstanding the great authority of Westlake and Dicey, it may be reasonably hoped that when the doctrine with all its consequences is squarely presented to the higher English courts they will not hesitate to reject the decisions of the courts that have lent color to *renvoi* in the English law as unsound in theory and as opposed to the principle of territorial sovereignty—the basis of the whole Conflict of Laws.

The courts of the United States, it would seem, have never been called upon to deal with the question of *renvoi*. Certain portions of the opinion in *Harral v. Harral*¹¹⁶ might create the belief that the Court of Errors and Appeals of New Jersey regarded itself as sitting in France, but it is more than likely that in affirming the judgment of the lower court, which had made it perfectly clear that by the law of matrimonial domicile only the internal or territorial law of the foreign country was meant, it entered upon a discussion of the French rules of Private International Law merely for the purpose of showing that they agreed with American law. Whatever the object of the discussion, as there was no disagreement between the French and American rules of Private International Law with regard to the point in issue, the doctrine of *renvoi* was not involved in the case.

The *renvoi* doctrine is, therefore, no part of the Conflict of Laws of the United States. Its introduction into our law would be most unfortunate on account of the uncertainty and confusion to which it would give rise in the administration of justice and its demoralizing effect upon the future development of the Conflict of Laws.

115. See also Bate, Notes on Renvoi 9, 119–120; Sewell, 3 Darras 523; 25 Law Quart. Rev. 91.

116. (1884) 39 N. J. Eq. 279.

3. THE *RENVOI* DOCTRINE IN THE CONFLICT OF LAWS—MEANING OF “THE LAW OF A COUNTRY”*

I

SOME years ago in writing on the present subject the author made the statement that the *renvoi* doctrine was no part of the conflict of laws of the United States.¹ In the light of certain more recent decisions or judicial utterances the question may properly be asked again: Should the courts of the United States adopt the *renvoi* theory in the conflict of laws? Although no discussion of the problem is yet to be found in any American decision, there are cases in which the *renvoi* doctrine has been sanctioned either expressly or by necessary implication. The case of *Guernsey v. The Imperial Bank of Canada*² and the case of *Lando v. Lando*³ may serve as illustrations. In the former case an action was brought in the Circuit Court of the United States for the District of Wyoming against the indorser of a promissory note. The note was made and indorsed in Illinois, but it was payable in Canada. Presentment, demand and protest were made, and notice of dishonor was given in compliance with the law of Canada; but the indorser claimed that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered judgment against the indorser. The latter's counsel insisted that the ruling was error on the ground that the sufficiency of the notice was governed by the law of the place of indorsement and not by the law of the place of payment. On appeal, the learned court made the following remarks concerning the above contention:

“To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that

* (1918) 27 YALE LAW JOURNAL 509.

1. *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COLUMBIA L. REV. 327, 344.

The *Annuaire de l'Institut de droit international* will be cited in this article as ANNUAIRE; the *Journal du droit international privé*, as CLUNET; the *Revue de droit international privé et droit pénal international*, as DARRAS; the *Zeitschrift für internationale Privat- und Strafrecht*, as NIEMEYER.

2. (1911, C. C. A. 8 C.) 188 Fed. 300.

3. (1910) 112 Minn. 257, 127 N. W. 1125.

state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. *Wooley v. Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. *If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor.*" ⁴

The statement quoted assumes that if the law of the place of indorsement (Illinois) must be satisfied in the matter of notice, and the law of the place of indorsement requires the notice to comply with the law of the place of payment (Canada), a notice sufficient under the law of Canada would be good. The reference to "the law of the state of Illinois" is understood thus, not as covering merely the ordinary law of Illinois governing notice, but as incorporating the law of Illinois as a whole, inclusive of its rules of the conflict of laws.

The decision in the case of *Lando v. Lando*⁵ rests upon the same assumption. The facts of the case were the following: Ida Oberg and David H. Lando, residents of Minnesota, were married at Hamburg, Germany, by a person who was not authorized by the law of Germany to join persons in marriage, but whom Ida Oberg believed in good faith to be a minister of the Gospel. The parties in question afterwards lived as husband and wife in Vienna, where they held themselves out as husband and wife, and where they were generally so regarded by their friends and acquaintances. David H. Lando died before returning to this country. Ida Lando claimed to be entitled to appointment as administratrix of his estate and thus put in issue the validity of their marriage. The supreme court of Minnesota was in doubt as to the meaning of the German rules of the conflict of laws governing the validity of marriage; but, applying the rule of interpretation *semper praesumitur pro matrimonio*, it reached the conclusion that the marriage would be sustained in Germany by virtue of the national law of the parties, that is, the law of Minnesota.

So far as the reasoning of the court bears upon the question

4. (1911) 188 Fed. 300, 301. The italics are those of the present writer.

5. (1910) 112 Minn. 257, 127 N. W. 1125.

of the conflict of laws, Justice Jaggard contented himself with the following statement:

"1. The validity of the marriage is to be determined by the law of Germany, where it was celebrated. It is a generally accepted principle of interstate and international law that the validity or invalidity of a marriage is to be determined by the law of the place where the ceremony is performed; that a marriage legal where solemnized is valid everywhere; and that a marriage void where it is celebrated is void everywhere. If the law of the place of trial were to control, a marriage might be valid in one state and invalid in another. It is obviously essential to the welfare of mankind that a marriage valid in one place should be valid everywhere. . . .

"This rule applies to cases where the parties attempting to marry are mere sojourners in the place where the marriage ceremony is claimed to have been performed. . . .

"2. The decisive question in the case is whether the parties were married in accordance with the German law. The court does not take judicial cognizance of the law on this point. It is elementary that foreign laws must be pleaded and proved like any other fact. . . ."

The court thereupon discusses the German law as it was stipulated by the parties and concludes its opinion with the following:

"We are unable to perceive why the presumption of validity of an attempted marriage should be denied to these parties, both innocent of moral wrong, and the presumption of innocence extended to the most confirmed recidivist. Certainly the considerations relied upon to repel that presumption are not clear nor satisfactory, nor at all conclusive. We are therefore constrained to hold that the marriage in question, conforming as it did to the Minnesota law, conformed also to the German law as its translation has been here agreed upon."

Not a word is said in the opinion about the fact that the term "German law" may mean either the ordinary German law of marriage, or the German law inclusive of its rules of the conflict of laws. The learned court assumes that the Minnesota law incorporates the German law as a whole.

II

The question raised by the above cases is one which has been greatly mooted among the writers on the conflict of laws. It is known as the problem of *renvoi*.⁶

6. The literature may be found in an appendix to this article.

In a recent work by Emil Potu, *La question du renvoi en droit international privé* (Paris, 1913), a complete list is given of all the authors who

The recognition of the *renvoi* theory implies that the rules of the conflict of laws are to be understood as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well. According to this theory "the law of a country" means the whole of its law.

Let us consider briefly the modes of reasoning which have led certain courts and text-writers to support this doctrine. The purpose of this article will be served best if the *renvoi* theory be presented only in the two principal forms in which it has appeared. One is the theory which we shall call, for convenience, the "theory of *renvoi* proper." The other is known as the "mutual disclaimer of jurisdiction theory." As the latter theory has the weighty support of Westlake, it will be considered first.

Mutual Disclaimer of Jurisdiction Theory

According to von Bar, who was the first to favor *renvoi* in this form, all rules of the conflict of laws are in reality rules by which one state, for the purpose of administering private law, defines its own jurisdiction and the jurisdiction of foreign states. Starting from this premise he reasoned as follows:

"Due respect for the sovereignty of the state of X should forbid the state of Y to ascribe to the state of X a jurisdiction which the state of X declines. Inasmuch as Italy applies the principle of nationality to the determination of capacity, England has no right to say that the capacity of an Englishman domiciled in Italy should be determined by the internal law of Italy relating to capacity. Italy having declined jurisdiction in the case, England must accept the reference back to its own law and determine the capacity of the Englishman in question by English law. If the *renvoi* is not accepted and the question is decided according to the internal law of Italy, Italian law is applied to cases for which it is not enacted. In so doing England would usurp the function of the Italian legislator, filling an assumed gap in the Italian law, directly contrary to the will of the Italian legislator."⁷

Von Bar presented his views at the meeting of the Institute of International Law, at Neuchatel, in 1900, in the form of the following theses:⁸

have expressed themselves on the question of *renvoi*, with an indication of their attitude in the matter. A similar attempt was made some years ago by the author of this article: see 10 COLUMBIA L. REV. 190, 194, 196.

7. See von Bar, 8 NIEMEYER, 177-188. Also in 2 Holtzendorff, *Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler) 19.

8. 18 ANNUAIRE, 41.

"(1) Every court shall observe the law of its country as regards the application of foreign laws.

(2) Provided that no express provision to the contrary exists, the court shall respect:

(a) The provision of a foreign law which disclaims the right to bind its nationals abroad as regards their personal statute, and desires that said personal statute shall be determined by the law of the domicile, or even by the law of the place where the act in question occurred.

(b) The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law."

Westlake originally rejected the *renvoi* doctrine except in special cases.⁹ He changed his view, however, before long and accepted the *renvoi* theory fully. The reasoning which led Westlake to this change of attitude is similar to the one employed by von Bar, but it is developed in a clearer and more logical manner. It was first expressed by Westlake in a note addressed to the Institute of International Law.¹⁰ *In substance* it is as follows:

"A distinction between internal law and international law belongs only to the science of law but does not actually exist. Suppose a legislator says (a) that the capacity to make a will shall be acquired at the age of 19; (b) that the capacity of persons shall be governed by their national law. Rule (a) would have no meaning without rule (b). Whose testamentary capacity is acquired at 19? No answer can be given without the aid of rule (b) fixing the category of persons whose capacity the legislator believes he has a right to fix. According to (b), (a) says that the capacity of the legislator's subjects is acquired at 19, but says nothing regarding the capacity of foreigners domiciled within the territory. If rule (b) had said that capacity shall be governed by the law of domicile, (a) would have enacted that the capacity of persons domiciled within the territory of the legislator is acquired at 19, but would have said nothing regarding the capacity of his own subjects domiciled abroad.

"In whatever terms rule (b) may be expressed, its true sense will be limited to the cases which, according to the ideas of the legislator, fall within his authority. There are normal cases which the legislator deems to belong to him and with regard to which he intends to legislate. The Danish legislator, for example, who attaches a decisive importance to domicile, will regard as the normal case in the matter under discussion a person domiciled in Denmark for whom he fixes

9. 17 ANNUAIRE, 31, 34.

10. 18 *Ibid.* 35-40.

the age at 21. To the Italian legislator, on the other hand, who attaches a decisive importance to nationality, the normal case will be that of an Italian subject; and for him he fixes the age at 19.

"A legislator who regards a certain case as normal will regard analogous cases as being normal for other legislators and as belonging to them. A Danish legislator will direct his judges, therefore, to recognize persons domiciled in a foreign country as capable or incapable of making a will in accordance with the law of their domicile, and the Italian legislator will regard foreigners as having such capacity to make a will as may have been conferred upon them by their national legislator.

"By means of this second step the Danish legislator provides for persons domiciled in a country whose legislation in the matter is also based on the *lex domicilii*. But it does not provide a rule for persons domiciled in a country such as Italy, whose legislation is silent as to the capacity of persons domiciled in such jurisdiction.

"In the same way the Italian legislator provides by this second step for the subjects of a country the legislation of which, like that of France, is based likewise on the principle of nationality, but it lays down no rule for the subjects of a state the legislation of which, like that of Denmark, makes no provision for its own subjects.

"A third step is necessary in these cases, namely, to direct the judge to apply in the absence of another law, the normal law. The Dane domiciled in Italy will be deemed in Denmark, therefore, to have reached the age of testamentary capacity only at 21; but in Italy he will be deemed to have reached it at the age of 19.

"The case known in Germany by the name of *Weiterverweisung* remains to be considered, that is, where the law incorporated by reference would have the law of a third state applied. Suppose two citizens of New York (capacity to contract being governed there by the *lex loci*) enter into a contract in Italy, being at that time domiciled in France, and that litigation with respect thereto arises in England. The *lex fori* (England), applying the law of the domicile at the time of the making of the contract to determine the capacity of the parties to enter it, will refer the matter to France. France having adopted the principle of nationality with respect to capacity will answer: 'The case does not belong to me; it belongs to the New York legislator.' Should the English judge, following the direction of the French law, ask the New York law, it would tell him that, in its opinion the case did not belong to New York, but (under the rule *lex loci*) to the Italian legislator.

"But rule (b) does not require the English judge to follow the direction given by France to consult New York law. Instead, he should apply the normal law of his own country, rule (a). The judge must determine in the first instance to which country the legal relationship presented to him belongs; if the law of the latter, based upon another system regarding the conflict of laws, says that the case does not belong to it, there is no further reference to the law of a third state."

Westlake discusses the problem also in his treatise on *Private International Law*, Chapter II,¹¹ where he states the problem in a somewhat different form :

"The matter is so cardinal in relation to the real meaning of private international law that, at the risk of being tedious, I will put it again in different language, but with a difference only of language. The English or Danish judge cannot hold the lad of nineteen to have attained his age unless he is prepared to answer the question, what lawgiver made him of age? That is independent of all views about the conflict of laws, for it results from the nature of law itself. Now the Italian code does indeed seem to lay down a rule about the status and capacity of all persons without exception, but this is only a misleading generality, for no one can doubt that the principle of nationality adopted in Italy prevents the Italian lawgiver from claiming authority over the capacity of a British or Danish subject. The English or Danish judge therefore cannot say that the Italian lawgiver made the *de cujus* of age at nineteen: Then, it will be asked, who is the lawgiver that keeps him a minor till he has attained twenty-one? And the answer is, the British or Danish lawgiver; for no one can doubt his authority over the capacity of his subjects if he chooses to exercise it, and the Italian lawgiver's disclaimer removes the objection which he would have felt to exercising it in the case of one of his subjects who was not domiciled in the British dominions or in Denmark. The result will coincide with that given by the *renvoi*, properly limited so as to avoid an endless series of references to and fro, but its real base lies, not in the doctrine of *renvoi*, but in the duty of considering the essential nature of the legal relation in question in any concrete case, and the essential meaning of the rules of private international law adopted in the different countries concerned."

The mutual disclaimer of jurisdiction theory of von Bar and Westlake, contrary to the theory of *renvoi* proper, necessarily leads to the application of the internal law of the forum in practically all cases in which the rules of the conflict of laws of the forum differ from those of the country whose law has *prima facie* been adopted and incorporated. Whenever there is a diversity in the rules of the conflict of laws of the two countries concerned, it means, according to this theory, that there is no internal rule in either country actually applicable to the case. In reality, there is a gap in the law which the judge of the forum, who is obliged to decide the case in some manner, is forced to fill up by applying his own internal law. As Westlake points out, there can be no question under this theory of a forward reference or *Weiterverweisung*. The judge is not to regard himself as sitting in the foreign country, as he is required to do under the theory of *renvoi* proper in its wider form; nor

11. (5th ed.) 33.

is he to follow the directions of the foreign law. All he is asked to do by the law of the forum is to ascertain whether the law of the foreign country which is incorporated claims jurisdiction over the case. If it does not, its law has nothing further to say in the matter; the law of the forum directs its judge in such event to apply its own internal law.

Von Bar would restrict his *renvoi* theory, as appears from his thesis No. 2 (a) quoted above,¹² to the cases where the personal statute is involved, that is, where the law of nationality comes into collision with the law of domicile or with the law of the place where the act in question occurred. Westlake, on the other hand, would apply the above reasoning to all cases in which divergent rules of the conflict of laws of the countries in question amount to a mutual disclaimer of jurisdiction. Such a disclaimer would follow in all cases where the rules of the conflict of laws differ, unless such difference arises from the fact that a foreign law leaves it optional with the parties whether they will be governed by such foreign law or by that of another state, such option not being allowed by the law of the forum. Let us assume, for example, that a question arises in the state of X in respect to the validity of a conveyance of land in the state of Y; the deed being executed in the state of Z in the form prescribed by the law of Z, but not in the form required by the local law of the state of Y. Let us assume also that the law of the state of Y authorizes the execution of deeds either in the form customary in the place of execution, or in that prescribed by the law of the *situs*. Should the courts of the state of X recognize the validity of the deed? Westlake's reasoning would not include this case, for the law of the state of Y as the law of the *situs*, which the law of the state of X has incorporated, does not disclaim jurisdiction. All it has done is to facilitate the formal execution of deeds relating to land within its territory by giving an option or choice.

One of the *rapporteurs* on the question of *renvoi* before the Institute of International Law, Professor Buzzati,¹³ raised the following objections to *renvoi* in the form suggested by von Bar and Westlake:

(1) The starting point, namely, that a legislator adopting the law of domicile to determine capacity is not interested in his subjects abroad and does not legislate with reference to them, and that a legislator adopting the law of nationality in his system of the conflict of laws is not interested in foreigners domiciled within his territory and does not legislate with re-

12. *Supra*, p. 58.

13. Buzzati, *Nochmals die Rückverweisung im internationalen Privatrecht*, 8 NIEMEYER, 449, 451-452.

spect to them, rests upon an erroneous assumption. It is absurd to say that the provisions of the Italian Civil Code do not apply to an Englishman who is domiciled in Italy.

(2) Neither von Bar nor Westlake denies the competency of a state to extend its jurisdiction over a matter which another state claims for itself. And yet, their theory rests upon the fundamental proposition that due respect for the state of X makes it improper for the state of Y to assign to the state of X a jurisdiction which the state of X declines. Just as if it were not a greater offense to deprive the state of X of a jurisdiction which it claims than it would be to assign to it a jurisdiction which it does not claim.

(3) The fundamental error of the theory consists in the assumption that it is possible for the state of Y to bring its own jurisdiction into perfect accord with that of other states so that there will be no infringement upon their jurisdiction. But this is impossible and will remain so as long as the states have different rules relating to the conflict of laws. Each state is, therefore, obliged to adopt its own rules without deferring to those of other states.

The first objection mentioned by Buzzati is elaborated more fully by Kahn.

"According to this writer the thought of the legislator in directing the application of foreign law is about as follows: 'Though I regard my law as the better and the more reasonable, it is generally more important to aim at international uniformity of treatment, even at the risk that objectively the result is not so good. If we should desire to apply our law exclusively in those cases also in which the legal relationship has a much more important connection with foreign countries, the advantage gained from the application of our better law would be out of proportion to the disadvantages with respect to international uncertainty of law resulting therefrom. . . . Just as I treat foreign law, so shall I also be treated in general. If I expect and demand that my law shall be taken into consideration by other countries, I must as far as possible admit the application of foreign law in analogous cases.

"We see, therefore, that the rule of private international law, however closely it may be connected with the rule of substantive law, is, nevertheless, by no means a pure expression of the applicability of our law; that the legislator establishing a certain point of contact for his private international law is far from asserting that he has no substantive law for other cases.

"The legislator determining the right of succession according to the domicile of the deceased says merely: 'For me, domicile is a more important point of contact than nationality or any other principle. I would gladly apply my rules concerning succession also to my subjects residing abroad, to all property situated in my territory, etc.

Yet I know that if I want to aim at international uniformity of law I can claim, on principle at least, but one point of contact. That being so, I prefer to assure the strict application of my rules concerning succession as to those who live in my territory. I will rather suffer an application of foreign law to my subjects abroad than to admit its application to persons domiciled within my territory.' ” ¹⁴

The writer of the present article called attention, on a former occasion, to the fact that Westlake's theory also lacks all support from an historical point of view. He there made the following observations: ¹⁵

“Without dwelling upon the singular results that would be obtained if Westlake's theory that there is in reality no positive conflict but merely a mutual disclaimer of jurisdiction became accepted law, it is easy to show that it rests upon premises which lack all real support. His point of departure—that there is an inseparable connection between the rules of Private International Law of a given country and its internal or territorial law, so that, according to the real intention of the legislator, the former must be deemed to define the limits of the latter's application, cannot be admitted. In Roman Law, for example, there were no rules of Private International Law in the proper sense; hence it would appear that the Roman legislator enacted laws without reference to their application in space. As to the modern continental countries, notwithstanding the fact that the science of Private International Law has been known to them since the fourteenth century, their present codes, almost without exception, contain such scant provisions relating to the Conflict of Laws that an assertion that the legislator in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law is an absurdity. In most instances no such rule of Private International Law could be found in any law. And with respect to England and the United States the unsoundness of Westlake's contention is all the more apparent for the reason that the law of England was fully developed before the rules relating to the Conflict of Laws, taken over from the continent, became a part thereof. With what show of reason can it be said then that the two are one and inseparable? Laws are enacted by a legislator without any thought of their operation in space. The object of the science of Private International Law of a particular country is to fix the limits of the application of the territorial law of such country, but its aim is not restricted to this. It includes also the determination of the foreign law applicable in those cases in which the *lex fori* does not control. Otherwise the courts of the forum would be left by the national legislator without a guide as to the applicatory law in that class of cases.”

14. 40 Ihering's *Jahrbücher für die Dogmatik*, 67–68.

15. 10 COLUMBIA L. REV. 190, 202–204.

Nothing further need be added to show that the *renvoi* theory in the above form is untenable.

Theory of Renvoi Proper

The term *renvoi* includes two notions: the notion of a "return reference," that is, *Rückverweisung*, and the notion of a "forward reference," that is, *Weiterverweisung*. Some of the writers would support the theory of *renvoi* proper only so far as it involves a return reference. The English and American courts, however, so far as they have recognized the *renvoi* doctrine, appear to have done so in its wider form, so as to include the possibility of a reference to the law of a third state.¹⁶

The theory of *renvoi* proper in its narrower form—*Rückverweisung*—has the following meaning:

If, for example, the English law directs its judge to distribute the personal estate of an Englishman who has died domiciled in Belgium in accordance with the law of his domicile, he must first inquire whether the law of Belgium would distribute personal property upon death in accordance with the law of domicile, and if he finds that the Belgian law would make the distribution in accordance with the law of nationality—that is, English law,—he must accept this reference back to his own law.

Bentwich appears to accept the *renvoi* theory in this form and advances the following argument in its support:

"The *renvoi* is in principle a reference back not to the whole law of the foreign country including its different rules of Private International Law, but simply to its internal law. Suppose a case where the *lex fori* (hereinafter called A) submits the matter to the *lex domicilii* (B), and B refers the matter back to A as the law of the nationality. A accepts the *Renvoi*, and applies its own law. If we regard first principles, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory, and so A would ordinarily apply to the succession. A, from motives of international comity and to secure a single system of succession, resigns its ordinary jurisdiction to B. But B, by reason of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised, and there is no ground for A to decline to accept the renunciation of B, since it thereby puts into operation its fundamental principle of regulating every matter within the territory."¹⁷

16. *In re Trufort* (1887) 36 Ch. D. 600; *Guernsey v. The Imperial Bank of Canada* (1911, C. C. A.) 188 Fed. 300.

17. Bentwich, *The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (1911) 184.

It will be noted that the *renvoi* theory in the above form, like Westlake's mutual waiver of jurisdiction theory, always leads to the application of the ordinary, or internal, law of the forum. The reasoning, however, upon which it is based is very different. According to Bentwich the rules of the conflict of laws of each state rest, as it were, upon the theory of an implied agreement among the states for the application of each other's law. The law of the foreign state is to be enforced only if the foreign state under the same circumstances would enforce the law of the forum. Unless reciprocity is guaranteed, the law of the forum will apply its own internal law. The question is thus raised whether the rules of the conflict of laws rest solely upon the principle of reciprocity. It is submitted that they do not. No doubt the courts of a state have come to apply foreign law partly because of their desire to assure the application of their own law by foreign courts. But this does not mean that reciprocity must exist with reference to any particular rule. Indeed, in the common law of the United States there is only a single instance where the courts insist upon reciprocity in the latter sense, namely, in the enforcement of foreign judgments by the federal courts.¹⁸ Considerations of justice and of expediency have played a very important part in the adoption of specific rules in the conflict of laws. To take the example which Bentwich cites for an illustration, can it be said that the law of domicile was adopted by the English and American courts in the distribution of personal property upon death solely because the continental courts had adopted this rule, so that reciprocity would be guaranteed? If this were so it would follow that if, at the time of the adoption of the *lex domicilii* in England in the distribution of movable property upon death, the rule of nationality had prevailed on the continent, as it does to-day, the English courts should have accepted the latter rule. It is clear, however, that they would not have done so, because it would not have suited English conditions. In a country in which private law is not unified, the law of nationality is an impracticable standard by which to determine private rights. The law of nationality being unacceptable, one of three rules might have been adopted—the law of the domicile of the deceased, the law of the *situs* of the property, or the internal law of the forum. Considerations of justice and expediency would probably have led to the adoption of the *lex domicilii*. Similarly, it may be shown that all other rules in the conflict of laws rest to a large degree upon considerations of justice, expediency, or policy.

18. *Hilton v. Guyot* (1895) 159 U. S. 113.

As the individual rules in the conflict of laws of England and the United States are not based upon the principle of reciprocity, it follows that these rules should, in the absence of clear reasons to the contrary, apply independently of the existence of like rules in the foreign system some provision of which is, in a given case, incorporated by reference. The theory of *renvoi* proper in its narrower sense, leading as it does to the application of the internal law of the forum in all cases where the rules of the conflict of laws of the forum differ from those of the foreign law which is incorporated by reference, has no basis unless it be a desire to apply, wherever possible, the law of the forum. It is nothing else than a return *pro tanto* to the doctrine of the exclusive prevalence of the internal law of the forum.

According to the theory of *renvoi* proper in its wider form, that is, inclusive of *Weiterverweisung*, the *lex fori* hands over the question to the legal system of the foreign country whose law is incorporated. The judge of the forum is to decide the case, therefore, as the courts of the foreign country would decide it. The English and American cases, so far as they sanction *renvoi*, have expressed it in this form. Their attitude appears clearly from the opinion of Sir Herbert Jenner in *Collier v. Rivaz*, where the learned justice, speaking of Belgian law, said: "*The court sitting here . . . decides as it would if sitting in Belgium.*"¹⁹ It must be noted, however, that the statement made by Sir Herbert Jenner is not to be taken literally. The English court does not *actually* decide the case as the Belgian court would. An illustration will make this plain. Suppose that an English judge is called upon to distribute the personal estate of an Englishman whose domicile at the time of his death was in Belgium. The English law would direct the judge to apply the *lex domicilii*, that is, the law of Belgium. If Sir Herbert Jenner's statement is to be taken in its literal meaning, the English judge would be compelled to ascertain how the Belgian judge would decide the case. Upon investigating the law of Belgium he would find that it would distribute the property in accordance with the principle of nationality, that is, in accordance with English law. He would also discover that the courts of Belgium have followed the *renvoi* theory consistently since 1881,²⁰ and that in consequence the distribution would

19. (1841) 2 Curt. Eccl. 855, 862-63. The italics are those of the present writer.

20. *Bigwood v. Bigwood*, App. Brussels, May 14, 1881 (*Belgique Judiciaire* (1881) 758). See also Trib. Civ. Brussels, March 2, 1887 (14 CLUNET, 748); App. Brussels, Dec. 24, 1887 (D. 1889, 2, 97); Trib. Nivelles, Feb. 19, 1879 (*Belgique Judiciaire* (1880) 982); Trib. Civ. Brussels, Dec. 1, 1894 (23 CLUNET, 895); Trib. Civ. Antwerp, March 16, 1895 (23 CLUNET, 655).

actually be made by them in accordance with the Belgian statute of distributions. The English judge should consequently apply the same statute of distributions. Although the English judge purports to sit in Belgium, he would, as a matter of fact, apply the *English* statute of distributions. He would not decide the case as the Belgian judge is obliged to do under Belgian law, ignoring the existence of the *renvoi* doctrine in the Belgian law. The reason why the *renvoi* doctrine of the foreign state is ignored is very plain. No decision could be reached if both judges should attempt to apply the *renvoi* doctrine actually existing in the foreign system. Each law would refer the judge to the law of the other state. There would thus be an endless series of references from which there is no escape.²¹

Because of this, *renvoi* is understood by each judge as a return reference simply to the *internal* law of his country and not to the whole of its law. It is not so certain, however, that the English courts would ignore a foreign *renvoi* doctrine in the case of a forward reference (*Weiterverweisung*), as distinguished from a return reference (*Rückverweisung*), like that just considered. The *renvoi* doctrine appears to be a mere expedient to which the courts resort in order to justify the application of their own law. Hence, if the foreign law (of the state of X), instead of directing the English judge back to his own law, should refer him to the law of another foreign state (state of Y), it is quite possible that he might state the conflict of laws rules of X (now assumed to be referred to by English law in a *renvoi* sense in accordance with the *actual* law of X), if by so doing he might be enabled to apply his own local law. Suppose, for example, that the law of the state of X has adopted the law of nationality in the distribution of personal property upon death, and that the law of the state of Y makes the distribution in accordance with the law of the *situs*; also that the decedent was a subject of the state of Y but was domiciled at the time of his death in the state of X. The property to be administered being in England, the English judge might say: "The law of the state of X which I am directed to apply, recognizing as it does the doctrine of *renvoi*, is referring me to the law of the state of Y as a whole, inclusive of its rules of the conflict of laws." This mode of reasoning would enable him to apply the statute of distributions of the forum.

The suggestion might be made that Sir Herbert Jenner used merely an inapt expression in characterizing the *renvoi* theory

21. Westlake suggested the mutual waiver of jurisdiction theory for the very purpose of avoiding this endless series of references: Westlake, *Private International Law* (5th ed.) 32-34; *supra*, p. 60.

of the English courts, and that Bentwich's explanation given above²² is a more accurate statement of the process. The two theories are, however, fundamentally different. Bentwich's theory necessarily leads to the application of the law of the forum, while the English courts apparently sanction the *renvoi* doctrine in its wider form, that is, inclusive of *Weiterverweisung*.²³ Such a forward reference can be justified only if the final decision in the case is handed over to the foreign law. Bentwich's theory is opposed to this.

The untenability of the theory of *renvoi* proper in its wider form will appear more clearly if its real meaning be set forth in another manner. What actually happens is this: When the English judge in the above case seeks to ascertain the statute in accordance with which he is to make the distribution, he is told by the English law: "I cannot tell you; go and ask the Belgian law." All the English law will do for him is to point out the country which is to give him the final answer. What is true in this case will happen in all cases in which the English judge is called upon to apply foreign law. *In no case will the English law answer any question directly. It will always delegate the task to another state.*

Should the Belgian courts have accepted the *renvoi* doctrine in the same form as the English courts, the Belgian judge again would get no final answer to his questions from the Belgian law, but would be told to ascertain it from the English law.

It is evident, however, that if the English rules of the conflict of laws do not point out any rule of internal law, but merely point out the country whose law is to decide the case, and if the Belgian rules of the conflict of laws are to be understood in the same sense, no direct answer can be found in either system, whether the question be asked by a national judge or by a foreign judge. There would be an endless chain of references, as we have already seen. As the doctrine is actually worked, there is no rule in the English law which will enable an *English* judge to reach a direct decision, but such a rule is, more or less arbitrarily, *assumed* to be found when a *foreign* judge is called upon to apply English law. The same inconsistency would be true of Belgian law. It would not point out a statute of distributions to the *Belgian* judge, but would be deemed to do so where an *English* judge is called upon to apply Belgian law.

The writer would submit that the rules of the conflict of laws of the forum should be regarded as incorporating by reference only the internal law of the foreign state and not its rules of

22. *Supra*, p. 64.

23. See *Re Trufort* (1887) 36 Ch. D. 601; *Guernsey v. The Imperial Bank of Canada* (1911, C. C. A.) 188 Fed. 300.

the conflict of laws. The moment it is granted that the adoption of the rules of the conflict of laws rests upon considerations of justice, expediency, and policy, it follows that each state must exercise its own judgment in the matter and determine the matter *finally*. This it fails to do when it adopts the theory of *renvoi* proper in its wider sense. Many writers have argued that the acceptance of the *renvoi* doctrine amounts to an abdication on the part of one sovereign in favor of another.²⁴ Bentwich denies this. He says:²⁵

"It is said again that the *renvoi* is 'a denial of Private International Law and of the internal autonomy of states.' By this apparently is meant that where a Court accepts the *renvoi*, it puts into force the principle of a foreign country for settling questions of conflict, and renounces its own principle. Thus in a particular case the English Court might apply the law of the nationality in place of the law of the domicile to the movable succession of a person who died abroad (cf. *Re Trufort* and *Re Johnson*). But to this it may be answered (1) that the *renvoi* is applied by way of exception, and, as already remarked, to secure the practical object for which private international law was designed; and (2) that it is a more serious denial of the autonomy of States to compel the operation of a foreign law upon a matter where it refuses to apply itself, than to apply the municipal law because the foreign law refuses jurisdiction. For example, if a French Court were to apply the English statute of distributions to the intestate succession of an Englishman dying domiciled in France, it would be really misapplying the English law to a case where the English legislator never meant it to operate. Like most of the objections to the *renvoi*, this argument against it is purely academic, based entirely on theoretical premises, and entirely regardless of practical consequences. And even on the ground of the pure theory of sovereignty, it may be pointed out that an English Court has no right to assume sovereignty, and decide what part of the foreign law is to be applied, when the person whose succession is in question is not subjected to it either *ratione personae* or *ratione territorii*."

In reply to Bentwich it may be said that there are no practical advantages to be derived from the adoption of the *renvoi* doctrine, as will be shown later.²⁶ The second argument advanced by Bentwich is but a repetition of the arguments advanced by von Bar and Westlake in favor of the mutual disclaimer of jurisdiction theory. Its unsoundness has been

24. Audinet, s. 1899, 2, 105; Bartin, 30 DARRAS, 295; 1 Gierke, *Deutsches Privatrecht*, 214; Klein, 27 ARCHIV FÜR BÜRGERLICHES RECHT, 273; Labbé, 12 CLUNET, 12; Lainé, 23 CLUNET, 256; 3 DARRAS, 334-335; Laurent, s. 1881, 4, 42; Potu, *La question du renvoi du droit international privé*, 319, 321.

25. *The Law of Domicile*, 186-187.

26. *Infra*, p. 70 *et seq.*

pointed out by Professor Buzzati.²⁷ To say that, when the French court applies the English statute of distributions to the intestate succession of an Englishman dying domiciled in France, it is misapplying the English law to a case where the English legislator never meant it to operate, is to misstate the whole problem. The very equality of states makes it impossible for one state to yield to the wishes of another state in this respect. France, therefore, is perfectly within her rights when she directs her judges to apply English law in the above case. And, contrary to Bentwich's assertion, the English courts are equally within their rights should they apply French law. Whether they do so *ratione personae* or *ratione territorii* or by virtue of any other principle cannot be questioned by anyone as long as no established principles of international law are violated. Unless the action of the legislature of a state or of its courts would amount to a "fundamental" denial of justice to the citizens of another sovereign, each state is free to act as it may deem best.²⁸

III

Should anyone be inclined to brush the foregoing arguments aside as "purely academic,"²⁹ let us consider the practical consequences to which the *renvoi* theory would lead. The chief object of the science of the conflict of laws being to bring about international uniformity of law, let us see whether the *renvoi* theory would be conducive to such an end.

According to the *mutual waiver of jurisdiction theory*, whenever the rules of the conflict of laws of the forum diverge from those of another state whose law has been incorporated by reference, the ordinary or internal law of the forum prevails. This result follows also from the theory of *renvoi* proper in its narrower form, as presented by Bentwich. Instead of promoting uniformity of decision in the different countries, the above theories will have the very opposite effect. If the *renvoi* doctrine be rejected, there is a possibility, it is true, that one state may distribute the personal estate upon death in accordance with the law of domicile, and another state, in accordance with the law of nationality. Two different statutes may thus become

27. *Supra*, p. 61.

28. See, for a full discussion of "fundamental" denial of justice to aliens, Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 13, 178, 196-199, 330-343. See also, Kahn, *Über Inhalt, Natur und Methode des internationalen Privatrechts*, 40 *Ihering's Jahrbücher für die Dogmatik*, 1, 40-41.

29. *The Law of Domicile*, 186.

applicable.³⁰ But if *renvoi* in either of the forms just mentioned be accepted, the property will be distributed in accordance with as many statutes as there are states before whose courts the question may come. Bentwich again takes a contrary view and says:

"The objection, however, is a figment of theory, and is not based on a solid practical difficulty. Even if no rule were established by an international convention for the application of the *Renvoi*, in any particular case the English Court or the French Court would know whether the other had already dealt with the succession. If this were so, it would adopt the principle already applied to the succession, and apply either its own rules of private international law or the doctrine of *renvoi* so as to subject the whole moveable succession to one law. Thus in the case supposed, if the English Court, first seised of the matter, had accepted the *renvoi* and applied English law to the English assets of the deceased, a French Court would naturally apply English law to the French assets according to its own rules."³¹

Instead of being a figment of theory, what has been set forth above represents the actual state of the decisions. Bentwich does not cite a single case in which a court has resorted to *renvoi* in one case and refrained from using it in another solely with a view to bringing about the application of the same ultimate rule of decision. The writer is convinced that no such cases can be found in any country.

One or two examples will show the extraordinary results to which, under the above theory, the substitution of the law of the forum for the foreign law may lead. Let us assume, in the first place, that an Englishman who is domiciled in Italy makes a contract in Italy, and that suit is brought in the United States for breach of the contract, the defense being lack of capacity. Let us assume also that England applies the law of domicile,³² Italy the law of nationality, and the United States the law of the place where the contract is made as the rule governing capacity to contract. According to Westlake's theory the law of the forum, that is, American law, would govern the question,

30. There is a possibility that the law of a third state might become applicable; for example, if property should be left in a state which has adopted the law of the *situs* for the distribution of personal property upon death.

31. *The Law of Domicile*, 183.

32. Whether the English law would apply the *lex domicilii* as regards ordinary business contracts is doubtful. As to such contracts the law of the place where the contract was made may control. See *Male v. Roberts* (1800) 3 Esp. 163; Dicey, *Conflict of Laws* (2d ed.) Rule 149, exception 1, p. 538; Cheng, *Rules of Private International Law Determining Capacity to Contract*, 70-72.

although its only connection with the case is the fact that suit is brought there.

Assume, in the next place, that according to the law of a given forum (state of X), the law of the *situs* (state of Y) would govern the validity of a testamentary trust, but that under the law of the *situs* the national law of the testator (state of Z) controls. The internal law of the state of X would determine the validity of the trust; and that solely because suit is brought there and because the law of the state of Y, which the law of the state of X incorporates, has a different rule in the conflict of laws.

There is no escape from consequences such as the above under the mutual disclaimer of jurisdiction theory as it has been developed by Westlake; and these prove the impossibility of accepting the *renvoi* theory in this form. *To the extent that this theory is applied, it means a return to the exclusive application of the ordinary or internal law of the forum, and a sacrifice of all that has been gained during the last century in the development of the rules of the conflict of laws.*

What has been said of the practical consequences to which the mutual disclaimer of jurisdiction theory leads is true also of *the theory of renvoi proper in its narrower sense*. According to the latter theory, whenever the foreign law declines to accept the jurisdiction which is offered to it by the law of the forum, the latter will control. As has been stated, there is nothing in the suggestion made by Bentwich that the *renvoi* theory may be invoked by the court for the purpose of bringing about uniformity of decision. No court, legislator, or writer other than Bentwich, so far as the present writer is aware, has ever suggested that a judge should apply, now the internal law of a foreign country, now its law as a whole, with a view of harmonizing his decision with the decision that has already been rendered in the case by a foreign court.

The doctrine of renvoi proper in its wider sense includes, as we have seen, the possibility of a forward reference (*Weiterverweisung*), and may thus lead to the application of the internal law of a third state. In so far as the application of the theory of *renvoi* proper in its wider form leads to a return reference (*Rückverweisung*), that is, to the *lex fori*, it has exactly the same disadvantages as the other theories. Instead of bringing about international uniformity of decision, it will cause the greatest disharmony possible by subjecting the determination of each case to the internal law of the forum. The English judge in the case above put³³ would distribute the per-

33. *Supra*, pp. 66-67.

sonal property in accordance with the English statute of distributions, while the Belgian judge would apply the Belgian statute of distributions. If the case should arise in New York, the judge would apply the New York statute of distributions.

In so far as the application of the theory of *renvoi* proper in its wider form leads to a forward reference (*Weiterverweisung*), it constitutes no gain whatever. Suppose that two Englishmen who are domiciled in the state of New York enter into a contract in Italy. Suit for breach of the contract is brought in New York, and the defense is lack of capacity. Which law should govern? If *renvoi* is rejected, the New York judge would apply the *lex loci contractus*, that is, the ordinary Italian law relating to capacity. England would apply New York law as the *lex domicilii* of the parties, and Italy would apply the English law as the *lex patriae* of the parties. If, on the other hand, these countries recognize *renvoi* proper in the wider sense (inclusive of *Weiterverweisung*), the New York courts would apply the whole of Italian law (*lex loci contractus*) and, being directed by the Italian rule of the conflict of laws to apply the *lex patriae*, would decide the question in accordance with the English law relating to capacity. The English judge would apply the New York law (*lex domicilii*) inclusive of its conflict of laws, and, being directed by the law of New York to apply the *lex loci contractus*, would determine the case in accordance with the Italian law relating to capacity. The Italian judge would apply the whole of the English law (*lex patriae*), and, being directed by the English judge to apply the *lex domicilii* would hold that the law of New York relating to capacity would control the case.

It is apparent, therefore, that the theory of *renvoi* proper in its wider form leads to no greater uniformity than is attained by rejecting the doctrine. We have seen, moreover,³⁴ that the doctrine of *Weiterverweisung* might be worked by the courts so as to lead to the application of the local law of the forum.³⁵

34. *Supra*, p. 67.

35. The New York judge might reason that the Italian rule of the conflict of laws was to be understood as referring him to the *lex patriae*, that is, English law, inclusive of its rules of the conflict of laws, and that he must decide the case in accordance with the law of domicile, that is, New York law. The English judge might say that the rules of the conflict of laws of New York referred to the *lex loci contractus*, that is, Italian law, inclusive of its rules of the conflict of laws, and that he should determine the case, therefore, in accordance with the law of nationality, that is, English law. The Italian judge in the same way might say that the English rule of the conflict of laws referred him to the *lex domicilii*, that is, New York law, inclusive of its rules of the conflict of laws, and that he must decide the case in accordance with the *lex loci contractus*, that is, Italian law.

Whatever form the *renvoi* doctrine may take, once it is recognized it is difficult if not impossible to limit its operation. In every case where the law of the forum incorporates the law of a foreign country, whether it be the law of the domicile, the law of the *situs* of the property, the law of the place where the marriage or contract was entered into, the law of the place where the contract was to be performed, the law of the place where the tort was committed or the law where the marriage was dissolved, or the law where the adoption proceedings, or acts upon which legitimation is based, took place, or any other law, the point might be urged that the law of the country referred to had a different rule on the subject. In the case where the law of the domicile and the law of nationality come into collision, it may be easy enough to ascertain the fact that the foreign country has accepted the principle of nationality; but the task of finding and understanding in all other cases the foreign rule of the conflict of laws covering the case in question is indeed Herculean in its nature.³⁶

A court may be inclined to accept the *renvoi* doctrine readily in cases where it leads to the application of its own law, but once it is accepted it must, if logically consistent, be applied under the theory of *renvoi* proper in its wider form—the theory of the English courts—whether it sends the judge back to the law of his own country or sends him forward to the law of a

36. If it be recalled how uncertain the law is in most states in this country as regards the rule governing the validity and obligation of contracts, it will be easy to realize what the state of the law must be with respect to the conflict of laws in countries not belonging to the Anglo-American group, in which the doctrine of *stare decisis* is unknown.

Even though the foreign rule is perfectly clear and definite it is frequently misunderstood. The case of *Lando v. Lando* (*supra*, n. 3) furnishes a striking illustration. The parties stipulated that the German law applicable to the case was as follows:

"Art. 13. The contraction of a marriage (otherwise translated 'entering into'), even if only one of the parties is a German, is determined in respect of each of the parties by the laws of the country of which he (or she) is a subject (otherwise translated 'to which each respectively belongs'). The same rule applies to an alien who concludes a marriage within the empire. . . .

"The form of a marriage which is concluded within the empire is determined exclusively by German law."

The last paragraph quoted clearly indicates that no marriage celebrated in Germany will be regarded as valid unless it is entered into in the form prescribed by the German law relating to marriage. See Planck, *Bürgerliches Gesetzbuch* (3d ed.) 50. The Supreme Court of Minnesota finds, however, that "the proper interpretation of the provision abounds in doubt and uncertainty," and thus feels justified in upholding the marriage by invoking the rule of interpretation, *semper presumitur pro matrimonio*.

foreign state. Whether he is led in the one direction or in the other, he must inquire into the foreign system of conflict of laws; and, after he has done this, which in a large proportion of cases involves a task far greater than that of applying the internal law of a foreign country, he may still be compelled to apply the internal law of a foreign state. This fact alone should be sufficient to deter the courts from adopting the *renvoi* doctrine in the above form.

So far as the effect of the doctrine of *renvoi* proper in its wider form upon the subject of the conflict of laws is concerned, it must be definitely understood that it will render the whole subject, which in its very nature is full of uncertainty, still more uncertain. The difficulty is not confined to the judge. The lawyer will have much greater difficulty in advising his clients as to their rights. Before he can do so, he must investigate three things: First, the rule of the conflict of laws of his country governing the case; second, the foreign rule of conflict of laws which is incorporated; and third, in many cases, the provisions of the internal or ordinary law of some foreign country. Take the simplest case of a trust in foreign real estate. The moment *renvoi* proper in its wider form is recognized, the primary question would no longer be whether the law of trusts of the *situs* of the property should recognize the validity of such trust, but what the rules of the conflict of laws of the *situs* are; and the latter may refer the judge to the law of another country, for example, to the national law of the owner.³⁷ In other words, in all cases the rights of the parties will depend not alone upon the rules of the conflict of laws of the forum, but also upon those of the foreign country whose law is incorporated by the law of the forum. A greater state of uncertainty in the law than that which arises from the theory of *renvoi* proper in its wider form is difficult to conceive. The general recognition of the *renvoi* doctrine in either of the forms outlined above would be fatal to the harmonious development of the rules of the conflict of laws in the future. No proper system of the conflict of laws can be built up among the civilized nations as long as this doctrine remains. It cannot be built up on the mutual waiver of jurisdiction theory, nor upon the theory of *renvoi* proper in its narrower form, because they imply a reversion *pro tanto* to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law. It cannot be built up on the theory of *renvoi* proper in its wider form, because the

37. See the unreported case of *Re Baines*, decided March 19, 1903, by Farwell, J., given in Dicey, *Conflict of Laws* (2d ed.) 723.

latter implies a shirking of all direct responsibility on the part of each state. According to the latter theory, a state is not bound to give a final answer to any question in the conflict of laws, but is regarded as having performed its full duty by handing a power of attorney for that purpose to another state. It is only when each state, through its legislature or courts, conceives itself obliged to assume direct responsibility in the matter, and learns to discharge its duty with a view to promoting international justice rather than petty and selfish ends of its own, that a proper basis will be created for any real progress in the science of the conflict of laws. The *renvoi* doctrine, however, in whatever form it be adopted, tends in just the opposite direction. Whatever strength this doctrine may gain temporarily because of the equivocal meaning of the term "law of a country" and the natural predisposition on the part of judges to apply their own law, there can be no doubt of its ultimate overthrow. Its days ought to be few after its deceptive character is fully understood.

IV

The conclusion having been fully established that the *renvoi* doctrine cannot be accepted as a general principle in the conflict of laws, we may briefly consider certain exceptional cases in which a recognition that the *lex fori* should incorporate the foreign law inclusive of its rules of the conflict of laws may be either necessary or expedient.

(1) It has been found necessary to accept the *renvoi* doctrine in the framing of international conventions as the only means of bringing together nations with different rules in the conflict of laws.³⁸

(2) Von Bar has called attention to a certain class of cases in which on grounds of justice it is necessary, it would seem, to recognize *renvoi* or something akin to it. He gives the following examples:³⁹

"Two subjects of the State of X are married in the State of Y, where they are domiciled. The validity of the marriage is questioned in the State of Z on the ground that the parties had no capacity to enter into the marriage under the provisions of the laws of the State of Y relating to marriage, though it is conceded that they possessed such capacity under the national law with respect to marriage. The

38. See Art. 1 on The Hague Convention of June 12, 1902, relating to marriage, and Art. 74 of The Uniform Law of The Hague Convention of 1912, relating to bills of exchange.

39. 8 NIEMEYER, 183-184.

laws of the States of X and Y agree that the *lex patriae* shall govern the essentials of a marriage. The law of the State of Z, on the other hand, applies the *lex loci celebrationis*. Should the courts of the State of Z regard the marriage as valid?

"A, a citizen of the State of X, dies domiciled in the State of Y. The laws of the States of X and Y agree that B is entitled to A's personal estate in accordance with A's national law. Subsequently B's heirship is contested in the State of Z, in which State the *lex domicilii* is held to govern the distribution of personal property upon death. Should B's title be recognized by the courts of the State of Z?"

Von Bar would answer both questions in the affirmative. He submitted the following rule, intended to cover the above class of cases, to the Institute of International Law:

"Provided that no express provision to the contrary exists, the court shall respect

"(b) The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law.⁴⁰

A motion embodying the above proposition was submitted to the Institute of International Law, but its consideration was postponed because the motion was deemed to embody something quite distinct from the *renvoi* doctrine in general.⁴¹

The rule in the form above stated actually accepts the doctrine of *renvoi* proper, provided (1) that the foreign countries with which the transactions may be connected have the same rule in the conflict of laws; (2) that the law of one of them be applicable under the law of the forum. Thus limited, the *renvoi* doctrine not only leads to results which are obviously just, but also tends to promote international uniformity in the decisions. The statement in *Guernsey v. The Imperial Bank of Canada* quoted above,⁴² may be supported on this ground.

(3) Because of the favor shown to marriages, the *lex loci celebrationis* might be deemed to incorporate the foreign law as a whole *for the purpose of sustaining a marriage*, as in the case of *Lando v. Lando*,⁴³ but not to defeat it. It would be preferable, however, if this result were reached through the adoption of an alternative rule in the conflict of laws. If, for example, the law of Minnesota, instead of saying that the marriage *must* satisfy the *lex loci celebrationis*, had said that a marriage should be

40. 18 ANNUAIRE, 41.

41. 18 ANNUAIRE, 186-187.

42. *Supra*, n. 2.

43. *Supra*, n. 3.

upheld if it satisfied either the law of the place where it was entered into or the law of the domicile of the parties, it would not have been necessary in *Lando v. Lando* to resort to the *renvoi* doctrine in order to render the marriage valid.

(4) It would seem that, by reason of the permanent and exclusive physical control which a nation has over immovable property within its territory, the validity of a conveyance of such property should be determined in accordance with the law of the *situs* as a whole. It would follow that if the law of the *situs* authorized the execution of a deed or will in the form prescribed by the law of the place of execution, its validity should be recognized everywhere. Similarly, if the law of the *situs* should determine the capacity of a party to dispose of such property by deed or will in accordance with the national law of its owner, the courts of all countries should apply this rule. This might lead to a return reference to the law of the forum or to a forward reference to the law of another country. It might involve even a second reference, for example, if the national law of the owner of the property should determine the question of majority in accordance with the law of domicile.

The question may be asked: Does the recognition of the *renvoi* doctrine as regards conveyances of immovable property not lead to the same insuperable difficulties pointed out in the general discussion? How can these cases be taken out of the general rule without destroying the rule itself? The writer is of the opinion that because of the permanent and exclusive physical control which a state has over all immovable property within its territory, which it does not possess with reference to movable property or with respect to persons, such an exception might be justified. By reason of such control the courts of most countries would probably be willing to look *primarily* to the law of the *situs* of the immovable property and to decide the questions *actually* as the courts of the *situs* would. In other words, it would seem that in the conveyance of immovable property there is a reasonable basis for the expectation that the adoption of the *renvoi* doctrine would promote international uniformity of decision.

Uniformity might be reached without recourse to the *renvoi* doctrine if all countries would adopt alternative rules in their systems of the conflict of laws. As regards the formal execution of a deed or will, the general acceptance of the rule *locus regit actum* as an alternative rule would be sufficient. With respect to capacity and the substantive validity of wills and deeds, international uniformity could be brought about only in case all countries were willing to sustain such instruments if they satis-

fied either the law of the *situs* or the national law of the owner.⁴⁴ Under present conditions, the *renvoi* doctrine would appear to be the only practicable means by which such uniformity can be attained.

44. If the law of some countries should happen to apply primarily the law of the domicile or the law of the place where the deed or will is executed, complete uniformity would not be attained unless all countries accepted these rules also as alternative rules.

4. THE THEORY OF QUALIFICATIONS AND THE CONFLICT OF LAWS*

THE differences existing in the rules of the conflict of laws in the various countries has given rise to the question whether the rules of the forum should be interpreted as adopting the foreign law in its totality, including its rules of the conflict of laws, or whether they should be deemed to incorporate only the foreign internal law. This problem is that of *renvoi*.¹ A problem of a different character, though equally fundamental, may arise, even if the rules of the conflict of laws of the countries involved in a given case are alike, because of a difference in the meaning of the concepts used. "Nationality," "domicil," "the law of the place of contracting," "the law of the place of performance," and "the law of the place where the tort was committed" are all legal concepts which may be determined in more than one way. The countries differ also on the question of what constitutes immovable and what movable property, on the meaning of "capacity," "form," "substance," "procedure," and in their definition of various other terms upon which the application of the foreign law depends. The question thus presenting itself is what law is to determine the meaning of the above terms. The problem referred to has given the greatest concern to the continental writers and is generally discussed by them under the title of "theory of qualifications."

CONTINENTAL LAW

From the standpoint of continental theory, the problem of the conflict of qualifications is one of the most difficult problems in the conflict of laws. Let us consider first the principal problems involved and thereupon the general theories which have been advanced for the solution of the problem.

Domicil. Domicil plays an important role in the Anglo-American and South American systems of the conflict of laws. On the continent and in a few of the South American countries it has been supplanted by the principle of nationality. The law of domicil is invoked even in these countries, however, when the

* (1920) 20 Columbia Law Review 247.

1. See (1910) 10 Columbia Law Rev. 190, 327; (1918) 27 Yale Law Journal, 509; (1919) 29 *ibid.* 214; (1918) 31 Harvard Law Rev. 523.

nationality of the party is unknown and under other circumstances. Suppose now that the question before a New York court is whether a citizen of the State of New York, formerly domiciled therein, has lost his New York domicil and become domiciled in France. Should the New York courts determine the question of domicil solely with reference to their own law or should they inquire into the French law of domicil? The question is of considerable practical importance because of the fact that the continental definition of domicil does not always agree with the Anglo-American. In some countries of Europe domicil denotes merely the center of a man's affairs without the connotation of permanent home.² A similar problem might be presented with reference to England, whose rules governing domicil differ in various respects from the American law, for example, as regards the reverter doctrine and as to the capacity of a married woman to acquire a separate domicil from her husband.

The continental writers maintain with respect to the question the greatest variety of views. Some agree with the French Court of Cassation that the question of domicil involves merely a question of fact and that a conflict with respect to the definition of domicil cannot, therefore, arise.³ Others concede that the notion of domicil is one of law and fact, but assume that the Roman conception of domicil has become the universal rule, so that there are actually no differences in regard to the question.⁴ Those conceding that the definitions of domicil vary in the different countries reach conclusions which are connected

2. See Art. 102, French Civil Code; Art. 16, Italian Civil Code. The French call it a *de facto* domicil to distinguish it from a "legal" or "authorized" domicil. The latter is a preliminary step to naturalization and confers upon the foreigner the enjoyment of all civil rights. See Art. 13, Civil Code.

3. The French Court of Cassation declines therefore to review the findings of the trial court with respect thereto. Cass. Oct. 22, 1900, Clunet 1900, 964. The lower courts determine the question in accordance with the French notion of domicil if the party resided in France. If the residence was in another state they profess to apply the national law of the party. App. Nancy, May 8, 1875, Sirey 1876, 2, 137; App. Toulouse, May 22, 1880; Sirey 1880, 2, 294. See also App. Brussels, Jan. 18, 1888, Dalloz 1888, 2, 249.

In Germany it has been held by the Imperial Court that the loss of a domicil should be determined with reference to the law of such domicil. Juristische Wochenschrift 1884, 28. See *ibid.*, 1895, 393.

4. Bar, Private International Law (Gillespie's transl.) 112. The Roman definition of domicil is as follows: "Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus; si nihil avocet, unde cum profectus est, peregrinari videtur, quo si rediit, peregrinari iam destitit." Code X, 40, 7.

more or less with their general theories concerning the conflict of laws. For example, some authors, supporting the principle of the "personality" of laws, would allow the national law of the party to govern the question.⁵ Weiss⁶ would allow an exception to the rule with respect to countries in which the law of domicile controls status and capacity. In such a case he sees no escape from the application of the law of the forum. Others would refer the decision to the law of the forum in all cases in which the party was a resident of the forum, and in all other cases, to his national law.⁷ Still others maintain that the *lex fori* is the only law that can furnish a solution of the problem in any case.⁸ The German writers determine the question of domicile in accordance with the law of each country in which the party may be deemed domiciled.⁹ If the application of this test should result in several domicils, Niemeyer¹⁰ would choose the one having the closest connection with the question before the court, that is, generally the older domicile. Zitelmann¹¹ would accept the older domicile if neither of the domicils was in the state of the forum. If one of them was in such state, he would choose that domicile.

Nationality. The law governing the acquisition and loss of nationality varies greatly in the different countries, so that it often happens that a person is claimed as a citizen or subject by

5. 3 Weiss, *Traité de droit international privé* (2d ed.) 323; Valéry, *Manuel de droit international privé*, 113; Durand, *Essai de droit international privé*, 373.

6. 3 Weiss, *op. cit.*, 323.

7. 1 Contuzzi, 1 *Codice civile nei rapporti del diritto internazionale privato*, 134; Despagnet & de Boeck, *Précis de droit international privé* (5th ed.), 501; Vincent & Pénaud, *Dictionnaire de droit international privé*, "Domicile" nos. 2-3.

8. Kahn, 30 *Ihering's Jahrbücher für die Dogmatik*, 76; Levis, *Das internationale Entmündigungsrecht des deutschen Reichs*, 24.

9. Neumann, *Internationales Privatrecht*, 51; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*, 71; 1 Zitelmann, *Internationales Privatrecht*, 178-179. "To have a domicile in a certain state," says Zitelmann, "signifies therefore . . . in the first place that a person has a domicile in such state according to the law of such state . . . The judge has to find the domicile to be so established irrespective of the principles governing domicile in his own law." 1 Zitelmann, *op. cit.*, 178-179.

10. *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*, 73. *Accord.* Barazetti, *Das internationale Privatrecht im bürgerlichen Gesetzbuche für das deutsche Reich*, 22; 1 Gierke, *Deutsches Privatrecht*, 220.

11. 1 Zitelmann, *op. cit.*, 180. *Accord:* Habicht, *Das internationale Privatrecht nach dem Einführungsgesetze zum bürgerlichen Gesetzbuche*, 230; Niedner, *Das Einführungsgesetz zum bürgerlichen Gesetzbuche* (2nd ed.) 85; Kühlenbeck, *Das Einführungsgesetz* (Vol. 6 of Staudinger's *Kommentar zum bürgerlichen Gesetzbuche*) 146. See also Neuman, *op. cit.*, 52. Planck prefers in certain cases the law of the place of residence to that of the older domicile. *Bürgerliches Gesetzbuch* (3d ed.), Vol. 6, 110.

several governments.¹² In countries determining the capacity of parties and various other questions in the conflict of laws in accordance with the law of nationality, this condition gives rise to a serious problem. Should the law of a particular country under these circumstances adhere in its system of the conflict of laws to the principle of nationality or should it yield in such a case to that of domicile? If the law of nationality is to be retained, what law is to determine the nationality of the party for the purpose of the litigation?

Where the law of the forum claims the party as a subject this law will naturally control. Courts and writers are agreed upon this point.¹³ But where the party has two foreign nationalities there is the greatest difference of opinion as to the one that should prevail. The only express legislative provision on the subject is to be found in the Japanese Civil Code, which provides that the nationality acquired last is to govern.¹⁴ The French Court of Cassation has applied the provisions of the French Civil Code relating to nationality in such a case.¹⁵ The lower courts, however, have sometimes abandoned the principle of nationality in these cases and substituted for it the law of domicile.¹⁶ A number of writers would allow the law of domicile to govern whenever the domicile of the party was in one of the foreign states concerned.¹⁷ Some would do so only if the foreign nationalities were acquired at the same time.¹⁸ If they were

12. Bisocchi, *Acquisto e perdita della nazionalità nella legislazione comparata e nel diritto internazionale*, 112; 1 Sieber, *Das Staatsbürgerrecht im internationalen Verkehr* 190; 1 Weiss, *op. cit.*, 255.

13. So expressly Art. 16 of the Japanese Civil Code. In support of this proposition see also Cass. Belge, June 12, 1876, *Clunet* 1878, 522; App. Toulouse, Jan. 26, 1876, *Clunet* 1877, 235; Court of First Instance of Luxembourg, Jan. 5, 1887, *Clunet* 1887, 674; Swiss Federal Tribunal, June 10, 1876, *Clunet* 1876, 231; Despagnet, *op. cit.*, 369-370; Esperson, *Condizione giuridico dello straniero*, 560; Habicht, *op. cit.*, 229; Kühlenbeck, *op. cit.*, 145; Niedner, *op. cit.*, 83; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*, 64; *Das internationale Privatrecht im Entwurf eines bürgerlichen Gesetzbuchs*, 25; 6 Planck, *op. cit.*, 111; Valery, *op. cit.*, 321; Venzi, *Foro italiano*, 1904, 1, 761-762; 1 Weiss, *op. cit.*, 784; 1 Zitelmann, *op. cit.*, 175.

14. Art. 16, Civil Code. To the same effect Barazetti, *op. cit.*, 22; Niemeyer, *Das internationale Privatrecht des bürgerlichen Gesetzbuchs*, 64, *Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts*, 125.

15. Cass. June 2, 1908, *Revue de droit international privé*, 1909, 247.

16. App. Aix, July 9, 1903, *Clunet* 1904, 150. To the same effect Bar, *op. cit.*, 205; Kahn, 30 *Ihering's Jahrbücher*, 69; Laurent, *Avant projet de révision du Code Civil*, art. 18, par. 3.

17. Habicht, *op. cit.*, 230; Niedner, *op. cit.*, 84; 1 Weiss, *op. cit.*, 785. See also 6 Planck, *op. cit.*, 111.

18. Barazetti, *op. cit.*, 22; Kühlenbeck, *op. cit.*, 145; Niemeyer, *Das internationale Privatrecht im Entwurf eines bürgerlichen Gesetzbuchs*, 25.

acquired in succession some¹⁹ would accept the nationality which was acquired last; others,²⁰ the one that was acquired first. If the party had no domicile in either of the foreign states some authors would accept the nationality of the state in which the party had his residence.²¹ Weiss²² would hold in such a case that he is a subject of the state the law of which presents the closest similarity to that of the forum. Fiore²³ and Planck²⁴ would prefer in this case the nationality based on blood relationship. Esperson²⁵ would do so only if the law of the forum accepted the principle of blood relationship. Wächter²⁶ would apply the *lex fori* in accordance with his general theory concerning the conflict of laws. Bartin²⁷ would leave the judge without any fixed criterion in this case. Valery²⁸ has suggested that the question depends upon the intention of the parties. Venzi²⁹ would allow the plaintiff to prove his nationality in conformity with the law of the State of which he claims to be a subject. Pillet³⁰ would respect the law of the place of birth and also the nationality claimed by virtue of blood relationship. If one party should base his contention upon the *jus soli* and the other upon the *jus sanguinis*, the French judge would be unable, according to Pillet, to proceed with the case until the parties had agreed upon the question of nationality.

Law of the Place of Contracting. Another question involving a "point of contact" of a transaction with the law of a given jurisdiction arises in connection with the law of contracts. Suppose, for example, that A in New York makes an offer to B in Petrograd which the latter accepts by mail. By the law of New York the contract is completed when the letter of acceptance is posted. By the law of Russia³¹ the contract is not

19. Barazetti, *op. cit.*, 22; Habicht, *op. cit.*, 230; Kuhlenbeck, *op. cit.*, 145; Niemeyer, Das internationale Privatrecht des bürgerlichen Gesetzbuchs, 64; Vorschläge und Materialien zum Entwurf eines bürgerlichen Gesetzbuchs, 25.

20. 1 Zitelmann, *op. cit.*, 176.

21. Barazetti, *op. cit.*, 22; Niemeyer, Das internationale Privatrecht im Entwurf eines bürgerlichen Gesetzbuchs, 25.

22. 1 Weiss, *op. cit.*, 785.

23. Fiore, Le droit internationale privé (4th ed., Antoine's translation) No. 332.

24. 6 Planck, *op. cit.*, 112.

25. *Op. cit.*, 568. In cases of naturalization Esperson chooses the nationality that corresponds most closely to the *lex fori*. *Op. cit.*, 578.

26. 24 Archiv für die civilistische Praxis, 265.

27. Clunet 1897, 471; Reprint 39.

28. *Op. cit.*, 328.

29. Foro italiano, 1904, 1, 762.

30. L'ordre publique, 89-91.

31. 3 Klubanski, Handbuch des gesammten russischen Zivilrechts, 5.

completed until the letter of acceptance reaches A. The same situation would be presented if B lived in Belgium,³² Italy,³³ Rumania,³⁴ and certain other countries.³⁵ If a dispute should arise with reference to the contract the answer would depend upon the law governing the contract. Let us assume that both New York and the foreign country are committed to the doctrine that the law of the place of contracting governs. The law of New York says that the contract is made in Russia. The law of Russia says that the place of contracting is New York. Which law is to determine the place of contracting?

Continental writers generally determine the obligation of contracts in accordance with the expressed or implied intention of the parties. The place where the contract is deemed made is, therefore, at most of secondary importance.³⁶ Many writers

32. App. Liège, Feb. 15, 1876, *Pasicrisie*, 1876, 2, 145; Apr. 22, 1885, *Pasicrisie*, 1885, 2, 335; Clunet 1886, 369; App. Brussels, Dec. 1, 1884, *Pasicrisie*, 1885, 2, 303; Clunet 1886, 369, Feb. 17, 1905, *Revue de droit international privé*, 1908, 288; Trib. Com. Louvain, July 26, 1887, *Gazette du Palais*, 1887, 2, 606; Trib. Com. Bruges, July 28, 1888, *Pandectes Périodiques*, 1889, 380; Trib. Com. Antwerp, Aug. 27, 1906, Clunet 1909, 235.

33. Art. 36, Commercial Code; Art. 1098, Civil Code; App. Milan, Dec. 11, 1888, Clunet 1892, 512; Cass. Turin, Apr. 26, 1881, *Foro italiano*, 1881, 1, 620; Jan. 13, 1891, *Monitore dei tribunali* 1891, 189; *La Legge* 1891, 1, 519; Clunet 1891, 1026; Cass. Rome, March 23, 1892, *Monitore*, 1892, 711. See also *Giurisprudenza sul codice civile*, art. 1098 No. 324 and cases there cited; *Giurisprudenza sul codice di commercio*, art. 36 and cases there cited. So as to jurisdiction of courts, Cass. Turin. Feb. 9, 1884, *Monitore* 1884, 268; Oct. 27, 1905, *Monitore* 1906, 101; App. Milan Dec. 1, 1888, *Monitore* 1889, 55.

34. Com. Code, Arts. 35-38.

35. App. Lyons, June 27, 1867, Dalloz 1867, 2, 193; App. Chambéry June 8, 1877, Dalloz 1878, 2, 113; App. Orléans, June 26, 1885, Dalloz 1886, 2, 135; App. Aix, Nov. 23, 1908, Dalloz 1909, 2, 61; Clunet 1909, 746; App. Nîmes, June 15, 1900, Dalloz, 1901, 2, 415; March 4, 1908, Dalloz 1908, 2, 248. So as to jurisdiction of courts, App. Bourges, Jan. 19, 1866, *Sirey* 1866, 2, 218; App. Lyons Apr. 29, 1875, *Sirey* 1875, 2, 263. The French courts favor more commonly the theory that the contract is made where the letter of acceptance is mailed. App. Pau, July 16, 1852, Dalloz 1854, 2, 205; App. Lyons June 1, 1857, Dalloz 1858, 2, 21; App. Caen, June 15, 1871, Dalloz 1872, 5, 111; March 30, 1889, *Gazette du Palais*, 1889, 1, 825; App. Douai, March 25, 1886, Dalloz 1888, 2, 37; App. Poitiers Nov. 4, 1886, *Gazette du Palais*, 1886, 2, 907; Jan. 21, 1891, Dalloz 1892, 2, 249, May 14, 1901, Dalloz 1902, 2, 12; Oct. 23, 1907, *Revue de droit international privé*, 1908, 222; App. Rennes, Dec. 15, 1891, Clunet 1892, 912; App. Paris, Feb. 5, 1910, Dalloz 1913, 2, 553. The Court of Cassation regards it as a question of fact. Cass. Aug. 6, 1867, *Sirey* 1867, 1, 400; Dalloz 1868, 1, 35; Dec. 1, 1875, Dalloz 1877, 1, 450; March 30, 1881, *Sirey* 1882, 1, 56; *Journal du Palais*, 1882, 1, 125.

36. The following presumptions have been proposed: (1) the common nationality of the parties, *Surville*, Clunet 1891, 369-370; (2) the common domicile, *Pillet*, *Principes de droit international privé*, 441; *Cours de droit*

deny that the rules relating to the completion of contracts by correspondence from the point of view of time can be rationally invoked for the solution of the problem from the standpoint of the conflict of laws. For these reasons the case suggested above is rarely discussed by the authors. Those that have dealt with it have, as a rule, applied the law of the forum.³⁷ Some writers have suggested that the *lex loci* should be determined in accordance with the intention of the parties, and, when the intention of the parties is not clear, by the judge in the light of the surrounding circumstances.³⁸

Law of the Place of Performance. According to the law of some countries, including Germany³⁹ and most states of this country,⁴⁰ the obligation of contracts is determined with reference to the law of the place of performance. Where the contract is silent regarding the place of performance such place must necessarily be determined by law. Suppose, now, that A of this country and B of Germany enter into a contract containing no express provision regarding the place of performance and that the American and German laws differ on the question where

international privé, 325; 20 Annuaire de l'Institut de droit international privé, 153; (3) the law of the domicile of the debtor, Bar, *op. cit.*, 443-446; (4) the national law of the offeror, Cass. Turin, Jan. 13, 1891, Clunet 1891, 1026. Some would apply the law which would retard the formation of the contract longest, Martin, Clunet, 1897, 476, Reprint 44-45; Chrétien, Clunet 1891, 1028; Dreyfus, L'acte juridique en droit international privé, 363; others the law of both states, Barazetti, *op. cit.*, 54; Hindenburg, Revue de droit international et de législation comparée, 1897, 263, 285; 2 Zitelmann, *op. cit.*, 164. Surville favors the common domicile in the absence of a common nationality. In the absence of a common nationality and domicile he would apply the *lex domicilii* of the party whose domicile was established in the country to which the other party belonged by nationality. In the absence of any of the above facts he would apply the law of the party who had taken a preponderating part in the negotiations. Clunet 1891, 369-371. The Institute of International Law adopted the following resolution: "If the contract has been concluded by correspondence, the *lex loci contractus* shall not be taken into consideration and the law of the domicile or commercial establishment of the offeror shall be applied." 22 Annuaire de l'Institut de droit international privé, 289-292.

37. Despagnet & de Boeck, *op. cit.*, 893; Clunet 1898, 271; 1 Diena, Diritto commerciale internazionale, 476, 479; Kahn, 30 Ihering's Jahrbücher, 99; Surville et Arthuys, Cours élémentaire de droit international privé (6th ed.), 306; Valery, *op. cit.*, 956; Louis Perez Verdía, Tratado elemental de derecho internacional privado, 188; 4 Weiss, *op. cit.*, 373.

38. Gemma, Propedeutica al diritto internazionale privato,—La cosiddetta teoria delle qualificazioni, 113-114; Niemeyer, Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts, 242.

39. Imperial Court, Oct. 13, 1894, 34 RG 191; Apr. 28, 1900, 46 RG 193; May 26, 1900, 46 RG 112; Apr. 21, 1902, 51 RG 218; June 16, 1903, 55 RG 105; July 4, 1904, 14 Zeitschrift für internationales Privat- und Strafrecht, 285; April 26, 1907, 18 *ibid.*, 177.

40. Beale, 23 Harvard Law Rev. 82, 194.

such place of performance is. If the action is brought in the United States in a state determining the rights and duties arising out of contracts by the law of the place of performance, we should have identical rules of the conflict of laws governing the case in the two countries involved, but a question would be raised regarding the law that should decide the preliminary question or point of contact, that is, what the place of performance is.

The above problem has remained practically unnoticed. Generally the assumption is made that the law of the countries concerned is identical with respect to the place of performance, but this is often erroneous in fact. The suggestion has been made also⁴¹ that the law governing the contract should determine the question, but it is obvious that if the law of the place of performance controls the obligation of the contract in the particular system of the conflict of laws, such suggestion involves a begging of the question at issue. Kahn⁴² points out that in the case under consideration only the law of the forum can furnish a solution of the preliminary problem.

Law of Place Where Tort is Committed. A problem similar to the one just discussed may present itself with respect to torts. The physical act causing the harm may take place in one state or country and the effect or effects resulting therefrom may occur in some other state or country or in several other states or countries. Although the law of the various countries concerned should agree upon the *lex loci delicti* as the rule governing torts in the conflict of laws, one of them might regard the place of the physical act as the *lex loci* and another, the place where the effect occurred.⁴³ How is the place where the tort is committed to be ascertained?

Kahn⁴⁴ appears to be the only writer who has considered this problem. As in the preceding cases he finds it necessary to determine the question in accordance with the law of the forum.

Movable or immovable property. The law may regard movable property for certain purposes as immovable property. Rights in realty may be assimilated by law either to immovable or to movable property. Artificial categories may thus be created with respect to which the law of the situs of the property, the law of the state governing the particular juridical

41. Gemma, *op. cit.*, 115-116.

42. Kahn, 30 Ihering's Jahrbücher, 99; Dreyfus, *op. cit.*, 308, note 1.

43. Zitelmann points out that the place where a wrongful act is committed may be determined differently in criminal law and in the law of torts. 2 *Op. cit.*, 479. Zitelmann himself prefers the law of the place where the muscular contraction took place. 1 *Op. cit.*, 112; 2 *op. cit.*, 480, 485.

44. 30 Ihering's Jahrbücher, 100.

relationship, and the law of the forum may differ. The question thus presents itself: What law shall determine the character of the property interest in question?

The statement is generally made that the questions must be determined by the law of the situs of the property.⁴⁵ Some of the leading writers contend, however, that this rule is incorrect and that the law governing the particular juridical relationship should control. According to these writers the law of the situs should govern with respect to property rights as such, but if the question arises in connection with the law of succession, matrimonial property, or contracts, it should be determined by the rule applicable in the conflict of laws to succession, matrimonial property or contracts.⁴⁶ Niemeyer⁴⁷ suggests, however, that such rule must yield to the law of the situs whenever the latter is mandatory. Kahn⁴⁸ insists upon the fact that if the application of the law of one state or country or that of another depends upon the character of the property as movable or immovable, the preliminary question regarding the character of such property must, for want of any other law that can control, depend upon the law of the forum.

Substance or Procedure. Anglo-American courts regard the statute of limitations as belonging to procedure. Elsewhere the question is generally deemed to affect the substance.⁴⁹ Suppose, now, that a contract is made in France, under the law of which the action is barred by the statute of limitations, and that the

45. Cass. April 5, 1887, *Clunet* 1889, 827; Sirey, 1889, 1, 387; Bartin, *Clunet* 1897, 251; Reprint 29; Bustamante, *Orden publico*, 256; 2 Cattellani, II, *diritto internazionale privato*, 424; Cavaglieri, *La distinzione fra atti civili e commerciali e la legge che la determina. Il Diritto Commerciale*, 1910, 48-49; Despagnet & deBoeck, *op. cit.*, 355; Diena, *I diritti reall*, 70; *Principi di diritto internazionale*, 75; *Sui limiti all' applicabilità del diritto straniero*, 27-28; Jettel, *Handbuch des internationalen Privat- und Strafrechts*, 106; Jitta, *Renovation of international law*, 125; Koster, *Internationaal burgerlijk Recht*, 148; 7 Laurent, *Le droit civil international*, 201; Schäffner, *Entwicklung des internationalen Privatrechts*, 80; Surville & Arthuys, *op. cit.*, 254; Valery, *op. cit.*, 879-880. The question whether a movable is in contemplation of law annexed to some immovable in another state is deemed controlled by the law of the situs of the movable. 2 Gierke, *op. cit.*, 226; 2 Zitelmann, *op. cit.*, 131; OLG Bayern, Nov. 11, 1882, 38 *Seuffert's Archiv*, no. 161.

46. Bar, *op. cit.*, 506; Crome, *Allgemeiner Teil der modernen französischen Privatrechtswissenschaft*, 88 and note 55; 1 Regelsberger, *Pandekten*, 172; 1 Stobbe, *Handbuch des deutschen Privatrechts* (2d ed.), sec. 32; Venzi, *Foro italiano*, 1904, 1, 763; 2 Zitelmann, *op. cit.*, 131.

47. *Vorschläge und Materialien zum Entwurf eines bürgerlichen Gesetzbuchs*, 261.

48. Kahn, 30 *Ihering's Jahrbücher*, 91, 95-97. See also Baudry-Lacantinerie & Wahl, *Successions*, Vol. I, 654; *Trib. de la Châtre*, July 5, 1910, *Clunet* 1911, 588 and note.

49. See (1919) 28 *Yale Law Journal* 492

suit is brought in New York, under the law of which the action is not barred. Will the law governing the contract, that is French law, or the law of the forum determine the question whether the action can be maintained?

So far as the continental writers have discussed this problem they have supported the law of the forum.⁵⁰

Substance, Capacity or Form. The following cases have been much discussed in connection with the conflict of qualifications.

(1) A and B, subjects of state X and domiciled in such state, make in state Y a joint will which conforms to the law of state Y. Is the will valid in state X if the law of state X declares joint wills to be void? We may assume (a) that the law of state Y regards the matter as one of form and the law of state X, as one going to the substance or to capacity; (b) that the law of state Y regards it as one of substance or capacity and the law of state X as one of form.⁵¹

Is the will valid in state Z if both states X and Y regard the question as one of form, but the law of state Z looks upon it as one of substance or capacity?

Bartin⁵² would decide the above cases in accordance with the law of the forum. Diena⁵³ would apply the law of the forum to the cases presented in the first paragraph and the law of states X and Y to the case mentioned in the last paragraph.

(2) The law of X forbids its subjects to execute a holographic will irrespective of the place of execution. A, of state X, executes such a will in state Y, in which state holographic wills are permitted. Is the will valid in state Y? In state Z?

Most courts⁵⁴ and authors⁵⁵ give effect to the law of X. The

50. Fedozzi, *Il diritto processuale civile internazionale*, 534-535; Kahn, 30 *Ihering's Jahrbücher*, 133.

51. There is much controversy whether the question relates to form or substance. See Cass. Florence, Nov. 12, 1897, *Monitore*, 1898, 245 (substance); Cass. Rome, April 24, 1876, *Giurisprudenza italiana* XXVIII, 1, 708 (form); Niedner, *op. cit.*, 35 (form); 2 Zitelmann, *op. cit.*, 154 (form). Cf. Contuzzi, *Il diritto ereditario internazionale*, 533-538.

52. Martin, *Clunet* 1897, 236, 480, 490-491; Reprint 14, 48, 58-59.

53. Diena, *Sui limiti*, 30. Fedozzi would also support the validity of the will in this case. *Op. cit.*, 825.

54. Belgium: App. Liège, June 18, 1874, *Pasicrisie* 1874, 2, 301; Trib. civ. Brussels, July 21, 1886, *Pandectes françaises* 1887, 5, 7; *Clunet* 1887, 495, Feb. 10, 1892, *Pasicrisie* 1892, 3, 139. France: Trib. civ. Seine, Aug. 13, 1903, *Clunet* 1904, 166; Trib. civ. Termonde, March 24, 1907, *Clunet* 1908, 885. Holland: Trib. Amsterdam, July 6, 1885, *Clunet* 1889, 175; Feb. 15, 1901, *Clunet* 1903, 417; *Weekblad von het Recht*, no. 7624. Italy: App. Genoa, Aug. 4, 1891, *Foro Italiano* 1892, 1, 116; *Clunet* 1893, 955; Cass. Turin April 12, 1892, *Clunet* 1894, 1083; *Monitore* 1892, 346; *Annali* 1892, 1, 242; *Foro Italiano* 1892, 801-802.

55. Despagne, *Clunet* 1898, 267; Durand, *op. cit.*, 401-402; 1 Laurent, *Principes de droit civil français*, 159; 6 Laurent, *Le droit civil interna-*

French Court of Cassation,⁵⁶ the Appellate Court of Orléans,⁵⁷ Bartin⁵⁸ and Diena⁵⁹ would apply the law of the forum. Buzzatti⁶⁰ and Fedozzi⁶¹ hold that the question is clearly one of form and that the will is therefore valid if it conforms to the law of the place of execution.⁶²

Rights of Surviving Widow as belonging to Law of Succession or to Law of Matrimonial Property. Under the continental law it is sometimes exceedingly difficult to know whether the rights of the surviving widow are given to her as a result of the matrimonial property régime or as a right of succession. Where there has been a change of domicile or nationality after the celebration of the marriage, the question whether the personal law at the time of the marriage or at the time of death will determine her rights may depend, therefore, upon this preliminary question.

The writers discussing this subject are inclined to make a distinction between the cases which are connected with the law of the forum by reason of the decedent's nationality or domicile and the cases where the law of the forum has no such connection with the subject. In the former situation Catellani⁶³ would apply the law governing the succession, and in the second, the "competent" law. Bartin⁶⁴ contends in favor of the law of the forum in both cases.

Civil or Commercial Acts. In continental countries special rules are often applicable to "commercial acts." This is true not only from the standpoint of the strictly internal law but also from that of the conflict of laws.⁶⁵ As the definition of a "commercial" act varies, the problem is whether the preliminary question as to what constitutes such act is to be determined by the strictly local law of the forum or whether the qualification of the foreign law shall be adopted.

Practically all are agreed that the *lex fori* will control with

tional, 695; Renault, *Revue critique de législation*, 1884, 736; 2 Rolin, *Principes de droit international privé*, 406; Di Stefano—Napolitani, *La massima "locus regit actum,"* 58-59; Surville & Arthuys, *op. cit.*, 20, note 277; 4 Weiss, *op. cit.*, 667.

56. Cass. Aug. 25, 1847, Dalloz 1847, 1, 273.

57. App. Orléans, Aug. 4, 1859; Dalloz 1859, 2, 158.

58. Clunet 1897, 229, 233, 236, 480; Reprint 7, 11, 14, 48.

59. *Sui limiti*, 26.

60. Di una nuova categoria di conflitti di leggi.—I conflitti di qualificazione (Studi giuridici varii pel cinquantesimo anno d' insegnamento di Enrico Pessina, Vol. III; Reprint, 16.

61. Il digesto italiano, vol. 22⁴, 828.

62. See also Colin, Clunet 1897, 937; Pillet, Clunet 1894, 722.

63. 2 Cattellani, *op. cit.*, 424.

64. Bartin, Clunet 1897, 236, 480, 726; Reprint, 14, 48, 70.

65. Italy, Art. 58, Commercial Code.

respect to the character of an act as commercial or civil if the ultimate question relates to the jurisdiction of courts.⁶⁶ Where the ultimate question involves the substantive rights of the parties some⁶⁷ would make the intention of the parties the controlling test, others⁶⁸ would apply the law of the place of contracting without reference to the intention of the parties, and still others,⁶⁹ the law of the forum.

The above are the principal questions which have been considered by the continental writers in connection with the problem of qualifications: Let us consider now the theories that have been proposed for the solution of the general problem.

GENERAL THEORIES

Bartin. Of the various attempts to formulate a general theory for the solution of the problems above outlined Bartin's "theory of qualifications" was the first to attract general attention. This writer maintains that whenever the application of the internal law of the forum or that of another country depends upon the nature of a particular juridical relationship, it is the law of the forum which must decide what the nature of the relationship is. The reasoning by which this conclusion is reached is the following. Bartin starts with the fundamental proposition that the law of the forum in authorizing the application of foreign law voluntarily restricts its own sovereignty. When the judge of the forum is directed, therefore, to apply foreign law to a particular legal institution or relationship, it is evident that the extent of the limitation upon the sovereignty of the former must be measured by the notion which the law of the forum entertains of such institution or relationship. A state cannot possibly be deemed to have entrusted the foreign law with the duty of determining which juridical relationships belong and which do not belong to the institution which the law of the forum intended to submit to the jurisdiction of the foreign law. If it did so the law of the forum would not define the

66. Bustamante, *Autarquia*, 232; 2 Catellani, *op. cit.*, 424; Cavaglieri, *Il Diritto Commerciale*, 1910, 37; Fedozzi, *Il diritto processuale civile internazionale*, 328. But see Calvo, *Le droit international* (5th ed.) 394.

67. App. Milan, July 1, 1914, *Foro italiano*, 1914, 1, 1326; *Rivista di diritto internazionale*, 1914, 610, (1919) 28 *Yale Law Journal* 806; Asser & Rivier, *op. cit.*, 187-188; Bustamante, *Autarquia*, 232; Grasso, *Principii di diritto internazionale* 279. Olivi, *Manuale di diritto internazionale* (2d ed.), 848-849; Surville & Arthuys, *op. cit.*, 641.

68. 1 Diena, *Diritto commerciale internazionale*, 62; 35 *Rivista italiana per le scienze giuridiche* 1903, 364; Valery, *op. cit.*, 1251.

69. Cavaglieri, *Il Diritto Commerciale*, 1910, 50; 1 *Lyon-Caen & Renault, Traité de droit commercial*, (4th ed.) no. 183.

extent of its obligation with reference to the foreign sovereignty as it has a right to do, for it would be the foreign law—the foreign sovereignty—that would in reality determine in such a case the extent of such obligation. By giving to the institution a wider meaning than it has under the law of the forum the foreign law would be able to extend the obligation indefinitely. The result would be that the law of the forum would no longer be master in its own home.⁷⁰

Bartin would apply the law of the forum also in the case where the juridical relationship as such had in its origin no connection with the law of the forum, and the foreign country or countries with which it was so connected qualify it in a different manner. He would do so without regard to the fact whether or not the qualification of one of the foreign laws agrees with the qualification of the forum. He is led to this conclusion through the following process of reasoning. The system of qualifications of the law of the forum is the necessary complement of the system of private international law which the law of the forum has adopted. Both are expressions of its idea concerning its own sovereignty and the limitation thereon which it feels bound to admit. As there is no authority other than that of the state which has power to define the sovereignty of such state and the extent to which the international community of nations limits its sovereignty and its laws enacted thereunder, each state is invested in the nature of things with the power to fix the extent itself, and in doing so it draws its inspiration necessarily not from the arbitrary counsels of comity but from the idea it entertains of sovereignty in general, including its own sovereignty. This notion of sovereignty on which this system of private international law rests together with its system of qualifications, which is the necessary complement thereto, is the expression of its conception of the requirements of international justice. It follows, therefore, that it must apply the same notion and everything depending thereon to the other states as well as to itself. When the judge has before him, therefore, two different qualifications of the same legal relationship, that is, two different expressions of sovereignty, he must naturally follow exclusively the qualification which results from his own notion of sovereignty. This notion the forum has constructed in an abstract, impersonal and disinterested manner, so that it may serve within its own territory for the purpose of separating the domain of its own law from the domain of the foreign law, as well as separating the domain of one foreign law from that of another.⁷¹

70. Clunet 1897, 236–239; Reprint 14–17.

71. Clunet 1897, 469–470; Reprint 37–38.

To the rule that the law of the forum must qualify all juridical relationships Bartin would recognize two exceptions: (1) With respect to the determination of a thing as movable or immovable he would apply the law of the situs, not because such law has sovereign authority over the soil but because it subserves best the security of transactions affecting property;⁷² (2) In the matter of contracts Bartin would determine the *lex loci contractus*, where the contract is made by correspondence, not with reference to the law of the forum but with reference to that law applicable to the case which would postpone its formation longest.⁷³

A number of writers agree in general with Bartin's theory.⁷⁴ Donnedieu de Vabres⁷⁵ takes issue, however, with Bartin's view that the application of foreign law by the law of the forum involves a limitation of its own sovereignty. This writer maintains that an appropriation of the foreign law that seems best to the forum constitutes an exercise of its own sovereignty and that it would be an abdication of such sovereignty if the forum should consult another qualification than its own.

Buzzatti. Originally Buzzatti agreed with Bartin only to the extent of holding that the determination of domicil and perhaps certain other points of contact must be governed by the law of the forum. As regards the other problems he felt that the cases discussed by Bartin resulted not so much from a difference in the laws of the different countries as from an erroneous interpretation and application of such laws.⁷⁶ Buzzatti has, however, modified his opinion since the time of the publication of his original article on the subject, so that his views coincide today more nearly with those expressed by Bartin.⁷⁷

Diena. Where the conflict in qualification is between the law of the forum and that of a foreign system Diena would agree with Bartin's conclusion. But where the only connection of the case with the law of the forum is the fact that suit is brought there Diena would not apply the qualification of the law of the forum whenever the foreign systems agree among themselves on the qualification of the legal transaction. In this case he would accept the common foreign qualification.⁷⁸

72. Clunet 1897, 250-253; Reprint 29-32.

73. Clunet 1897, 476; Reprint 44.

74. The following writers agree with Bartin's general conclusion. Anzilotti, *Rivista di diritto internazionale*, 1914, 614; Cavaglieri, *Il Diritto Commerciale*, 1910, 53; Fedozzi, *Il digesto italiano*.—*Diritto internazionale*.—*Successione*, Vol. 22^a, 810; Venzi, *Foro italiano*, 1904, 1, 761.

75. Clunet 1905, 1234.

76. *Op. cit.*, 15-17.

77. Professor Buzzatti had the kindness so to inform the writer.

78. *Sui limiti all' applicabilità del diritto straniero*, 30.

Kahn. Kahn dealt with most of the problems contained in this article a considerable time before Bartin advanced his theory of qualifications.⁷⁹ Under the head of "Collisions in the Point of Contact" he included nationality, domicile, *lex loci contractus*, *lex loci solutionis*, *lex loci delicti*, and the question of movable and immovable property. The other cases in which there is a difference in the qualification of juridical relations or institutions he discussed under the heading of "Latent Conflict of Laws." With respect to both classes of problems Kahn held that the law of the forum was alone competent to define the particular institution, relationship, or legal concept.⁸⁰ He found it impossible, however, to apply this principle to the case of double nationality when the law of the forum is disinterested. In this case he would abandon the rule of nationality and substitute for it that of domicile.⁸¹

Despagnet. Despagnet has advanced the proposition that the law governing the legal relationship must control also its qualification. His argument in support of this conclusion is the following: When a judge, drawing his inspiration from his own law and the principles of private international law, decides that a foreign law should be applied to a particular juridical relationship, he must be understood as applying such law so far as it organizes and regulates such relationship. Now the first point that attracts the attention of the legislator and the first thing determined by him is the nature or qualification of the relationship which he regulates. To disregard his decision in this respect is tantamount to a nonapplication of the law to which the juridical relationship in question was on principle subject. If the national law has made a certain question one of capacity, can it be said that if the question is converted into one of form by the law of the forum the law which should govern the capacity of individuals has been applied? No! The very principle has been violated. What is of capital importance and what produces all subsequent juridical consequences is precisely the qualification to be given to a juridical relationship and it is a flagrant contradiction in fact to import the qualification of the forum and at the same time to pretend that one is following the foreign law. Take the classical example—Article 3, Paragraph 3, of the French Civil Code, according to which the capacity of foreigners is regulated by the national law. This article is manifestly violated if we should say that the prohibition to make a will in holographic form which exists in Holland with respect to Dutch subjects is a question of form according to the

79. Kahn's view is adopted by Regelsberger. 1 Pandekten, 165.

80. 30 Ihering's Jahrbücher, 76, 91, 99.

81. Ibid., 69.

French legislation, when the national law of the Dutch subject has made of it a question of capacity. It seems evident that the first consequence resulting from the adoption of a law for the regulation of a certain relationship is the necessity of adopting also the nature which it attributes to it and the qualification which it gives to the relationship.⁸²

According to Despagnet, therefore, a judge must accept the qualification adopted by the foreign law, in order to apply the latter in conformity with the rules of private international law sanctioned by his own law. This view is shared on principle by several other writers.⁸³

Gemma. According to this writer the principles of the conflict of laws should not be deduced from the function of the state and of the judge, but the norms for a state and judge should be deduced on the basis of the conflict of laws. Gemma would separate the juridical relations and institutions from the positive legislations of the various states, so that their function may be considered without bias with reference to the requirements of international life. The judge should, therefore, appreciate the qualification of legal transactions solely with reference to that law which is most favorable to the development of the relationship itself in its extraterritorial aspect. According to Gemma the will of a Dutch subject executed in the holographic form in a country in which such wills are permitted should be recognized by the courts of other countries, not because the law of the forum regards the question as one of form (Bartin), nor because the national law governing in the system of the conflict of laws of the forum regards it as a question of capacity (Despagnet), but because a proper international order requires that persons abroad should be able to execute wills in as simple a form as possible and the holographic will best answers this requirement. The judge should have in mind the international principles and not those of the forum. Otherwise a real system of private international law can never be built up.⁸⁴

Jitta. This author rejects all mechanical application of the *lex fori*, the *lex domicilii*, the *lex rei sitæ*, the *lex loci contractus*, etc., and inquires always what are the reasonable requirements of international social life in the particular case. If a juridical relationship belongs to a particular local sphere he will apply the law of that sphere, including its qualification. The question whether property is movable or immovable or whether a particular individual is a trader would be decided, therefore, in ac-

82. Clunet 1898, 261-262. See also Despagnet & de Boeck, *op. cit.*, 357.

83. See 2 Catellani *Il diritto internazionale privato*, 426.

84. *Propedeutica al diritto internazionale privato*, 111-112.

cordance with this principle by the law of the situs⁸⁵ or by the law of the place where the business was carried on. If the juridical relationship belongs to international social life, as for example, a contract having direct connection with several countries or states, the rule to be applied would be the "international-common" rule, if such can be found, and if none exists, the reasonable principles of international social life.⁸⁶ It is apparent that in a system like this the conflict of qualifications presents no special problem and coincides in all cases with the general problem of the choice of law.

ENGLISH AND AMERICAN LAW

There is scarcely any discussion of the problem of the conflict of qualifications in the decisions of the English and American courts or by the Anglo-American text writers. The general attitude of the Anglo-American law with reference to the problem appears, however, to be clear, and with reference to some lines of cases a solution is clearly established by authority.

Movable and immovable property. The law of the situs controls the question whether property or an interest therein is to be regarded as movable or immovable property. This question was clearly decided in *Johnstone v. Baker*,⁸⁷ where it was held that a Scotch heritable bond, that is a mortgage deed on Scotch realty, which was in the possession of an English testator, being regarded by Scotch law as an integral part of the realty, would be deemed real estate in England for the purpose of descent. English law was held to control as the *lex rei sitæ* and not as the *lex fori* in other cases also in which the situs of the land was in England. *Chatfield v. Berchtoldt*⁸⁸ raised the question whether a rent charge *pur outre vie* issuing out of English land, owned by a person domiciled in Hungary, was liable to legacy duty as personal estate under the English statutes, which make estates *pur outre vie* applicable as personal estate in the hands of an executor and administrator. It was assumed throughout the case that the English law as the law of the situs would determine the real or personal nature of the interest in question. In *Freke v. Lord Carbery*⁸⁹ it was held that the validity of a testamentary disposition of an English leasehold was governed by the law of England as the law of the situs, and not by that of the testator's domicil. The same principle was applied to the

85. La méthode, 125. See also *internationaal Privatrecht*, 69-71.

86. La méthode, 136.

87. (1819) 4 Madd. 474, n.

88. (1872) L. R. 7 Ch. 192.

89. (1873) L. R. 16 Eq. 461.

devolution of a leasehold in case of intestate succession in *Duncan v. Lawson*.⁹⁰ In the same way, the character of a mortgage on realty as movable or immovable property has been determined by the law of the situs.⁹¹

Domicil. The English courts have been guided in the determination of domicile exclusively by English law and have paid no attention whatever to the foreign law. The attitude of the English law is well expressed by the Master of Rolls, Sir Nathaniel Lindley, in the case of *In re Martin*, in which the learned judge says:⁹²

"The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognised in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a French woman, but it would be contrary to sound principle to determine her domicile at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English Court on the view that Court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer v. Freeman*, *Doglioni v. Crispin*, and *In re Trufort*. In each of the last two cases a foreign Court had determined the domicile, and the English Court had also to determine it, and did determine it to be the same as that determined by the foreign Court. But, as I understand those cases, the English Court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the Courts of this country proceeds upon the principles to which I have alluded."

The only English case suggesting a different proposition is that of *In re Johnson*.⁹³ In that case Justice Farwell expressed the opinion that an English woman could acquire no domicile in Baden, although she resided permanently in the grand-duchy because the law of Baden determined the question before the court by the law of nationality and paid no regard to that of domicile.

"No change is effectual," said the learned judge, "unless the factum is proved, and the factum cannot exist in a country where the

90. (1889) L. R. 41 Ch. D. 394.

91. *Newcomer v. Orem* (1852) 2 Md. 297; *Crandell v. Barker* (1898) 8 N. Dak. 263, 78 N. W. 347; *Martin v. Stovall* (1899) 103 Tenn. 1, 52 S. W. 296; *In re Hoyles* (1910, C. A.) 27 T. L. R. 131.

92. (1900) P. D. 211, 227.

93. (1903) 1 Ch. 821.

law refuses to recognize it. The result is that this court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus, therefore, is left with his domicile of origin unaffected. The Baden courts would in effect have disavowed him and disclaimed jurisdiction. This appears to me to be the logical result of the application of our rules respecting domicile and to be in accordance with justice.”⁹⁴

Westlake⁹⁵ has given his approval to the above reasoning. “On the main point,” he says, “the judgment, as well as the reasoning which has been quoted from it, was in accordance with the doctrine which I have advocated.” Dicey⁹⁶ is of the opinion that all that Westlake probably meant to say was that the legal effects of domicile were to be determined solely with regard to the foreign law and without reference to the legal effect of domicile under the law of the forum. This thought is expressed by Westlake in another place where he says that “no one can acquire a personal law in the teeth of that law itself.”⁹⁷ In other words, the English judge should not apply the foreign law if it does not want to be applied. This is in accordance with Westlake’s general view concerning the application of foreign law, for Westlake supports the *renvoi* theory in the sense of the “*désistement*” or mutual disclaimer of jurisdiction theory.⁹⁸ As Farwell in the second line of reasoning in *In re Johnson* employed the *renvoi* proper reasoning which Westlake disapproves, the latter preferred to accept the learned judge’s first argument.

It is obvious, however, that Farwell was in error when he assumed that the Baden law refused to recognize the *factum* of domicile. There is no doubt whatever that Miss Johnson was domiciled in Baden according to Baden law. The Baden courts would take jurisdiction and distribute the property left by her in Baden, but such distribution would be made in accordance with the rule of the conflict of laws then established in Baden, namely, the decedent’s national law.

The decision of *In re Johnson* was followed by *In re Bowes*,⁹⁹ without any written opinion.

94. Ibid. 828.

95. Private International Law (5th ed.) 41.

96. Conflict of Laws (2d ed.), 118.

97. *Op. cit.*, 353.

98. *Op. cit.* See 10 Columbia Law Rev. 190, 327; 27 Yale Law Journal, 509; 29 *ibid.*, 214.

99. (1906) 22 T. L. R. 711.

Relying upon the above cases Hibbert¹⁰⁰ states the following two propositions as existing English law: (1) The law of the locality in question must recognize that domicile results from the party's presence within its territory; (2) The requirements, if any, for the acquisition of a domicile, imposed by the law of the locality in which the party permanently resides must have been complied with. It is submitted, however, that there is no warrant for the conclusions just stated, for the conflict in the cases relied upon by Hibbert turns actually upon a difference in the rules of the conflict of laws and not upon a difference in the conception of domicile. So far as the case of *In re Johnson* may hold by way of implication that a domicile cannot be established in a country without a compliance with the rules of such state relating to domicile, it is contrary to the established law of England.

In the United States there are no cases containing any such suggestions regarding domicile as those found in *In re Johnson*. On the contrary, there are a number of decisions showing that a domicile may be established in another state or in a foreign country without reference to the notion of domicile in the law of such state or country.¹⁰¹ The case of *In re Colburn's Estate*¹⁰² is no exception to the rule. In that case the Supreme Court of Iowa decided in favor of an Iowa domicile, but in so doing referred to the Oklahoma "business domicile" statute. Such reference did not, however, necessarily involve the assumption that the Oklahoma law would be controlling on the issue of domicile, but rather that the statute in question while purporting to impose an Oklahoma domicile in certain cases in fact merely prescribed the devolution of local property. The cases in general show clearly that the question of domicile is to be decided by reference to the "general" or international law as incorporated into the law of the forum and not by reference to any foreign jurisdiction.

Lex loci contractus. No English or American cases have been found which have raised the question whether the *lex loci contractus* of a contract made by correspondence should be determined by the law of the forum or by the law of some other state. In the cases raising the question the foreign law was either assumed to be identical with that of the forum with respect to the place where the contract was made, or the question was

100. International Private Law, 13-14.

101. *Harral v. Wallis* (1883) 37 N. J. Eq. 458, affirmed under name of *Harral v. Harral* (1884) 37 N. J. Eq. 279; *Dupuy v. Wurtz* (1873) 53 N. Y. 556; *In re Martin's Estate* (1916) 94 Misc. 81, 157 N. Y. Supp. 474.

102. (*Iowa*, 1919) 173 N. W. 35.

held to depend upon the intention of the parties,¹⁰³ so that it was not necessary to consider the question under discussion. There would appear to be no doubt, however, that the law of the forum controls.

Capacity or form. This question was raised in *Ogden v. Ogden*.¹⁰⁴ A Frenchman, domiciled in France, married an English woman in England without the consent of his parents, which consent was required by French law, though not by English law. He subsequently obtained a decree of nullity in France for want of such consent. The woman thereupon married again. On discovering the existence of the first marriage her husband sued for divorce in England on the ground of bigamy. The Court of Appeal decided in his favor on the ground that the French decision of nullity was void, being contrary to the English rules of the conflict of laws, namely, that the consent of parents is a matter of formality and subject therefore to the law of the place where the marriage was celebrated.

In view of the above cases it may be asserted that according to Anglo-American law the qualification of legal transactions as well as the definitions of "domicil," "the law of the place of contracting," and of the other "points of contact" are governed in general by the strictly internal law of the forum, the principal exception to the rule being that the character of property as movable or immovable is controlled by the law of the situs. This conclusion is also the only one that is consistent with the Anglo-American theory of the conflict of laws.

Anglo-American law agrees thus in substance with the conclusion reached by Bartin and Kahn. The point at issue between the foreign writers is nothing less than a fundamental difference in their conception of the conflict of laws. Bartin and Kahn are nationalists in their viewpoint while Despagnet and Gemma are internationalists. As the difference between these schools may be found in some of the most recent treatises on the conflict of laws in English¹⁰⁵ only a few words need be said concerning them in this place. Both nationalists and internationalists differ among themselves. A common characteristic of all internationalists is their position that the rules of the conflict of laws are dictated to the individual states from without by some species of international law. According to them there is but a single system of the conflict of laws, the rules of which are binding for purely international reasons. The nationalists are agreed, on the other hand, that the rules of the conflict of

103. *Hansen v. Dixon* (1906) 23 T. L. R. 56.

104. (1908) P. 46.

105. Beale, *Conflict of Laws*, 86, *et seq.*; Baty, *Polarized Law*, 148 *et seq.*; Bar, *Private International Law*, 42 *et seq.*

laws form a part of the national law of each state and that there are, therefore, as many systems of the conflict of laws as there are independent states. Given this difference in their point of view it is natural that the internationalists should attempt to find some "international" solution for the problem of qualifications, and that the nationalists should be content to solve it with reference to the law of each state.

That the international theory is idealistic and not in accord with reality is obvious. International law has not furnished the existing rules of the conflict of laws; nor does it impose to-day in this respect upon the nations any far-reaching obligations. Indeed, Anglo-American writers and the nationalists in general are in the habit of asserting that international law leaves the different nations absolutely free in regard to the adoption of their rules of the conflict of laws, and that they may, if they desire, adjudicate all cases in accordance with their own rules of internal law.¹⁰⁶ This position, however, cannot be maintained, for there is a well established rule of international law which forbids a fundamental denial of justice to aliens.¹⁰⁷ We must agree also with Kahn¹⁰⁸ that no state is authorized at the present development of international relations to exclude the application of foreign law altogether or to act arbitrarily in the application of its rules of the conflict of laws. Suppose, for example, that state X should debar from local recognition all marriages except those consummated within its territory and that an American husband and wife, who had taken up their residence in state X, should be prosecuted for illicit rela-

106. "It follows from the independence of each state within its own borders that it might without contravening any principles of international law regulate every set of circumstances which calls for decision exclusively by its own law." Holland, *Jurisprudence* (10th ed.) 402. To the same effect, Story, *Conflict of Laws* (8th ed.), 25; Wheaton, *International Law* (9th ed.) 133-134; Woolsey, *International law* (6th ed.) 102-109; Baty, *op. cit.* 9; Hall, *International law* (8th ed.) 51; Lawrence, *International law* (4th ed.) 246; Twiss, *Law of Nations*, new ed., 261. The continental writers hold that the exclusion of all foreign law would be regarded today as a violation of international duty. Bluntschli, *Das moderne Völkerrecht*, 27-28; Diena, *Principi di diritto internazionale*, 23; Kahn, 40 *Ihering's Jahrbücher*, 40.

107. Borchard, *Diplomatic Protection of Citizens Abroad*, 13, 178, 196-199, 330 *et seq.*

108. 40 *Ihering's Jahrbücher*, 40. Kahn is inclined to add to the above some special rules, for example, that the law of the situs controls as to property rights in immovables and that a state is not authorized to extend its rules governing domestic relations and the law of inheritance to persons temporarily within the state. These rules having been followed consistently by the great majority of states, a deviation therefrom would, according to Kahn, constitute a breach of an international legal duty. *Ibid.* 41-42.

tions. Or suppose that state X should admit alien residents and then refuse recognition to titles to personal property acquired under foreign law. Can there be any doubt, if the government of the United States should file a protest against such "outrageous" legislation for the protection of American citizens that international law would support its claim?

While the existence of external restraint cannot, therefore, be denied altogether, the fact remains nevertheless that up to the present time, barring treaty provisions and such general principles of international law as there may be which debar the local sovereign from adopting rules of conflict drastically oppressive, the national legislator or the courts of a state can adopt any rules of the conflict of laws whatever. The assertion on the part of the Anglo-American courts and of the jurists representing the nationalistic theory of the conflict of laws that the extent of the application of foreign law in a given state depends, with the above reservations, upon the consent of such states is based, therefore, upon fact.

Assuming, then, that the international theory of the conflict of laws rests almost wholly upon fiction let us consider briefly the Anglo-American theory and its relation to the problem of qualifications. Anglo-American courts and writers, following Huber's usage, frequently say that the application of foreign law rests upon "comity." Continental writers take strong exception to this viewpoint on the mistaken assumption that comity connotes arbitrary conduct and the absence of the idea of justice.¹⁰⁹ In fact it is fully recognized in England and in this

109. The foreign writers of today are practically unanimous in condemning the theory of comity. See, however, Torres Campos, *Elementos de derecho internacional privado* (4th ed.) 108; Aubry, *Clunet* 1901, 664. Bustamante says concerning comity:

"Comity is a pretext for the evasion of the consequences of a strict territorial law. After the notion of such law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, ideas so important for the history of law, play a part . . . The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations." *Tratado de derecho internacional privado*, 456. The key to the continental point of view may be found in the fact that the word "comity" on the continent is regarded as opposed to "justice." The plain truth is, of course, that our courts are guided in the application of foreign law by the same sense of duty as they are in the application of purely internal law. Concerning the subject see more fully 13 *Illinois Law L. Rev.* 396-401; Wigmore, *Celebration Legal Essays*, 220-225.

country, as well as on the continent, that the application of foreign law results from the dictates of justice and from the mutual convenience of nations as understood and applied by the courts of the forum.¹¹⁰ Speaking generally, it may be said that Anglo-American law still accepts the maxims first formulated by Huber regarding the basis of the conflict of laws. These maxims are the following:¹¹¹

“(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.

“(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.¹¹²

“(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so

110. Story says:

“It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy as a matter of paramount moral duty. Now assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the duty, but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretence to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust. . . .

“The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return . . .

“There is then not only no impropriety in the use of the phrase ‘comity of nations,’ but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided.” *Op. cit.*, 32, 33, 35.

111. “*Praelect.*” pt. 2, bk. 1, tit. 3, n. 2.

112. The words “are to be deemed subjects thereof” are understood today as meaning “are to be deemed subject to its jurisdiction.”

far as they do not cause prejudice to the power or rights of such government or of its subjects."

These maxims were approved by Story.¹¹³ Since Story the doctrine of the territoriality of laws has been regarded as the foundation upon which the Anglo-American system of the conflict of laws rests.

Holland¹¹⁴ has called attention to the fact that Anglo-American courts in reality never enforce foreign laws but rights acquired under such laws. He says that what really happens when a law seems to obtain extraterritorial effect is that "rights created and defined by foreign law obtain recognition by the domestic tribunal." Dicey¹¹⁵ and Beale accept this view and the latter¹¹⁶ asserts that the common law has worked out indigenously a theory of "vested rights."¹¹⁷

"The topic called 'Conflict of Laws,'" says Beale, "deals with the recognition and enforcement of foreign-created rights."¹¹⁸

And in regard to the law governing contracts he uses the following language:

"The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles (§ 14) be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it (§ 4). If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so."¹¹⁹

"If the law of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity. . . .

"In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, *i. e.*, the law of the place where the parties act in making their agreement. If by that law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it. . . .

113. *Op. cit.*, sec. 20.

114. *Op. cit.*, 411. Cf. Kahn, 30 *Ihering's Jahrbücher* 28.

115. *Op. cit.*, 11, 26; 6 *Law Quarterly Rev.* 10; 7 *ibid.* 114.

116. *Op. cit.*, 105.

117. For a criticism of the theory of vested rights see Wächter, 25 *Archiv für die civilistische Praxis*, 2 *et seq.*

118. Summary, sec. 1.

119. *Ibid.* sec. 90.

"This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory."¹²⁰

Beale's theory appears to be that there is a territorial law exclusively applicable to a particular group of facts which *must* prevail in determining legal consequences. Several decisions of the Supreme Court of the United States lend support to the same doctrine. In *Slater v. Mexican National R. R. Co.*,¹²¹ Mr. Justice Holmes says:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction.¹²² But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which like other obligations, follows the person, and may be enforced wherever the person may be found.¹²³ But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation,¹²⁴ but equally determines its extent."¹²⁵

Notwithstanding these statements by such eminent authorities, it is submitted that while the theory that a particular territorial law is exclusively applicable to a particular set of operative facts may be established in this country as a matter of constitutional law, it cannot be accepted analytically as a sound basis for the conflict of laws. Where all the operative facts occur in a single state it may be conceded that *as a matter of expediency* the rights of the parties should be determined ordinarily in accordance with the law of such state. But if the forum sees fit it may adopt another rule. Where the operative facts occur in or affect more than one state, there is much

120. 23 Harvard Law Rev., 267, 268, 271.

121. (1904) 194 U. S. 120, 126, 24 Sup. Ct. 581.

122. *Stewart v. Baltimore & O. R. Co.* (1897) 168 U. S. 445, 18 Sup. Ct. 105.

123. *Stout v. Wood* (1820) 1 Blackf. (Ind.) 71; *Dennick v. Railroad Co.* (1880) 103 U. S. 11.

124. *Smith v. Condry* (1843) 42 U. S. 28.

125. See also, *Davis v. Mills* (1904) 194 U. S. 451, 24 Sup. Ct. 692; *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542, 34 Sup. Ct. 955; *Spokane Inland R. R. v. Whitley* (1915) 237 U. S. 487, 35 Sup. Ct. 655

greater difficulty in selecting the governing rule. Generally speaking Anglo-American law will incorporate the law of some particular foreign state. It will select at times the law of the place where the act was done or was to be performed; at other times the law of the situs of the property and not of the place of acting; at other times still it will choose neither the law of the place of acting nor that of the situs of the property but the law of the domicil. Where a contract is entered into through an agent, it will bind the principal in accordance with the law of the place where the agent acts, although the principal was never in the latter state and he had no capacity under the law of the state in which he was domiciled and in which he appointed the agent. Sometimes a legal transaction will be sustained if it conforms to the law of one of several states.

That there is *no logical necessity* for the application of any particular rule selected by Anglo-American law is seen from the fact that different rules with respect to the same set of facts often prevail in foreign countries. Nor can our rules of the conflict of laws be explained by any theory of "territoriality," other than the general doctrine that the law of the forum selects the rules which shall control.¹²⁶ In fact, the only answer that can be given to the question why the common law has chosen a particular rule to govern in the conflict of laws or in any other branch of law is that it has seemed to the forum sound policy to do so.

That the English courts have not felt *bound* to attach the same legal consequences to the foreign operative facts, as is done by the law of the foreign state, appears clearly from *Machado v. Fontes*¹²⁷ and other English cases. In the former case the publication of a libel occurred in Brazil and under the law of that state such publication constituted only a penal offense and gave rise to no private action, and yet the English Court of Appeal allowed such an action. It attributed therefore to the operative facts in Brazil other legal consequences than those attached thereto by the law of Brazil. In *Pemberton v. Hughes*¹²⁸ the Court of Appeal stated that it would recognize a Florida divorce, although such divorce was null and void under the law of Florida.

When Anglo-American courts enforce a judgment from a continental country for the payment of money they are in fact

126. See (1918) 27 Yale Law Journal 816; (1920) Yale Law Journal. The confusion caused by the use of the word "territorial" in different senses has been admirably shown by Aubry, Clunet, 1900, 694; 1901, 254, 263.

127. (1897) 2 Q. B. 231.

128. (1899) 1 Ch. (C. A.) 781. See also, *Ogden v. Ogden* (1908) P. 46.

creating new rights, for in continental law a judgment entitles the party to execution, but does not constitute as it does in England and in this country a new cause of action.¹²⁹ Speaking of the enforcement of judgments in general Cook says:

"This clearly is a loose and technically erroneous way of putting the matter. What we ought to say is, that the common law of England and of each of the American states attaches to foreign judgments which comply with certain conditions the legal consequences described in our law by the term debt. The action brought in a common law jurisdiction is for the purpose of enforcing or vindicating that common law debt, not the foreign judgment. The latter is merely one of a set of operative facts which according to the principles of the common law result in a debt. Similarly, where a common law court permits an action of debt to be brought upon a chancery decree for the payment of money the common law court does not enforce the chancery decree in any way. It merely treats the latter as an operative fact which results in a common law debt, for the non-payment of which the common law court will give relief."¹³⁰

Hohfeld¹³¹ entertained the same view and made it the basis of his course on the conflict of laws both at Leland Stanford and at Yale. His position was that the courts of a sovereign state may attach any legal consequences whatever to any state of facts, including acts done in foreign countries. Cook makes in this regard the following observations:¹³²

"Aside from some existing system of positive law—constitutional, statutory, or judge-made—it seems clear that there is no inherent reason why the law of any sovereign nation—England, for example—may not, if the sovereign English Parliament or the appropriate English court so decrees, attach any legal consequences whatever to any state of facts whatever, including acts done in other countries, even by persons not citizens or residents of England. This simply amounts to saying that as a sovereign nation England may determine what legal consequences shall in England, by English courts, be held to attach to a given state of facts, if in any way the English court is presented with a case involving them. Suppose, for example, that an English statute should provide that any person whatsoever who, under the circumstances described in the statute, injured any other person anywhere in the world, should be deemed guilty of a tort and that if he ever came into England or owned any property there he should be subject to suit and damages assessed in a prescribed manner: surely the English courts would be bound to apply the statute

129. Imperial Court of Germany, June 30, 1886, 16 R G 427.

130. 28 Yale Law Journal 71.

131. See 9 Columbia Law Rev. 496, 520.

132. 28 Yale Law Journal 69-70.

to all cases coming within its scope. Clearly, also, they could not enforce the statute against persons committing the acts in question outside the jurisdiction so long as these persons both remained outside and had no property within the jurisdiction. To describe this situation in appropriate legal terminology must we not say that such a statute would *as a matter of substantive law* create primary rights in every person in the world to have all other persons refrain from the described conduct, and that when anyone was guilty of those acts anywhere a secondary English right to damages would arise? This right could not, of course, be enforced so long as the tortfeasor both remained outside of England and had no property there; but this is equally true where the tort is committed in England and the tortfeasor before action is brought, or even after it has been brought, leaves that jurisdiction and has no property within the same. That the law of England does not in fact attempt to go so far as in the case just put does not, then, show any inherent lack of power on the part of the English legislature or courts, but merely that they have refrained from establishing such a system for other reasons."

As long as the Anglo-American notion of law is based upon the existence of physical force on the part of organized society,¹³³ all legal relations, including rights, duties, privileges, no-rights, powers, liabilities, immunities and disabilities must necessarily have reference to some particular territorial law. Each organized society, by virtue of its existence as a sovereign, is obliged to define for itself what rights, duties, privileges, etc., shall attach to the operative facts which may be presented for

133. The continental writers are very much opposed to the Anglo-American conception of law. Law to them "is the direct consciousness, however produced, of a binding rule. . . . If it is the common consciousness of the nation, we have municipal or state law, in its various branches. If it is the common consciousness of the civilized world, it may take various forms, which may all be classed as supra-national. It may regard the relations of States to one another; or it may regard the relations of individuals to one another." . . .

"Still, whichever of these varying schools we side with, we shall find that the content of the common consciousness which they all postulate is very meagre indeed. In fact, there is no such common sense of what is binding in private relations which have an international side.

"We must, nevertheless, remember that it is quite possible that such common consciousness might exist, and that it is at any rate held by the vast majority of thinkers that, if it exists, and in so far as it exists, it is, properly speaking, law—*Droit*." Baty, *op. cit.*, 150, 151.

Baty accepts von Bar's view. "Von Bar, speaking of the theory that nothing is law which does not rest upon forcible legislation, observes—'Is that not also law, which necessarily corresponds to the nature of the subject?' . . . By invoking the sense of binding obligation, which, in fact, does arise from the nature of things, he supplies Private International Law with a real foundation apart from the law of any particular State. Of course, the obligation is nascent—in my view it is grotesquely rudimentary—but it is real, and not theoretical and 'imparfait'." *Op. cit.*, 152.

determination to its judicial or executive agents, without directions or suggestions from the organized society within whose territory those facts may have occurred. Whether the operative facts happened wholly within its territory or partly or wholly without such territory cannot make any difference. "Rights"¹³⁴ being the correlatives of "duties" for the non-performance of which organized society will inflict disagreeable consequences upon the person owing the duties, it is impossible, of course, to recognize that a party has a legal right in a given state if there are no remedies available in such state for its enforcement.¹³⁵

But is the power of the forum to attach legal consequences to acts done in other countries not limited by international law?

"Of course some other sovereign nation may object," says Cook, "on the ground that 'international law' is being violated, or on any other grounds it chooses to assert. The United States, for example, did this successfully in the *Cutting Case*,¹³⁶ in which Mexico claimed the right to punish an American citizen for acts done in the United States. It can hardly be asserted, however, that Mexican law was not law in Mexico, *i. e.*, binding on the Mexican courts. If from the present war there emerges a real League of Nations with power to enforce its decrees, a different legal situation may result."¹³⁷

134. That the term "rights" should be used in this specific sense has been convincingly shown by Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913), 23 *Yale Law Journal* 16; 26 *ibid.* 710; See also, Cook, *Hohfeld's Contributions to the Science of Law* (1919), 28 *Yale L. J.* 721; Corbin, *Legal Analysis and Terminology* (1919) 29 *Yale Law Journal* 163. Holland says: "Every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right . . . When it will be enforced by the power of the State to which they are amenable, it is their 'legal duty.' The correlative . . . of legal right is legal duty. These pairs of correlative terms express, it will be observed, in each case, the same state of facts viewed from opposite sides." *Op. cit.*, 88.

135. Cf. Beale, *Summary*, Sec. 47: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere . . .

"A slave for the same reason must be recognized as such, even in a free state. It is true that if a slave comes into a free state he cannot be restrained by his master; not because he ceases to be a slave but because in such a state there is no right in a master to restrain a slave."

Sec. 48: "Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force. Since a right can have no legal force unless it is given force by law (§ 2), and since nothing can have the force of law in a state except the law of that State (§ 11), it follows that no foreign right can be enforced unless the law of the State so provides. It depends upon the law as to the enforcement of foreign rights, that is, upon a principle of the Conflict of Laws."

136. 2 Moore, *Int. Law Dig.* 228.

137. 28 *Yale Law Journal* 69, note.

A sovereign state has, so far as its judicial or administrative agents are concerned, clearly the power to enforce any rules it pleases. Having this power to impose its will it may, of course, prescribe rules in contravention of international law.

"If the legislature of a particular country," says Lord Chief Justice Cockburn, "should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the courts of such country to give effect to such enactment, leaving it to the state to settle the question of international law with the governments of other nations."¹³⁸

Indeed, in this country the courts are bound by the Constitution of the United States to enforce the provisions of a federal statute which conflict with the express terms of a prior treaty.¹³⁹ A discrepancy between the municipal law and the international obligation of a state may impose upon the latter a duty to indemnify the party whose rights under international law have been violated, but cannot lead to a reversal of the actual decision of the case by the courts. So far as private rights are concerned there would appear to be no exception to or qualification of the above rule. In the domain of public law¹⁴⁰ it is possible that an alien convicted under a statute which violates his rights under international law may, upon the request of his government, be set free through the power of the executive branch of the government.¹⁴¹

138. *Reg. v. Keyn*, L. R. 2 Ex. D. 63, 160.

139. *The Cherokee Tobacco Case* (1870) 78 U. S. 616; *The Head Money Cases* (1884) 112 U. S. 580, 5 Sup. Ct. 247; *Alvarez y Sanchez v. United States* (1910) 216 U. S. 167, 30 Sup. Ct. 361.

140. The Selective Draft Act of May 18, 1917, under the terms of which aliens who had declared their intention to become citizens of the United States were subject to military duty, created a situation where the municipal law of the land conflicted with the rules of international law. In conformity with the precedents above cited it was held that the provisions of the Act were binding upon the courts, even where they conflicted with the terms of a prior treaty. *Ex Parte Larrucea* (1917) 249 Fed. 981. See 28 *Yale Law Journal* 83. *Larrucea* was set free, however, by order of the President as Commander-in-Chief of our army, upon the recommendation of the State Department, which admitted that the Act was in violation of our treaty with Spain. A number of South Americans were released in like manner without any existing treaty, on the general ground that the Selective Draft Act violated with respect to them the principles of international law.

141. The statement that international law is a part of our national law (see *The Nereide*, (1815) 13 U. S. 388; *The Scotia*, (1871) 81 U. S., 170, 187-188; *The Paquete Habana* (1899) 175 U. S. 677, 700, 20 Sup. Ct. 290, must be understood, according to Foulke, in the sense that if no rule of municipal law is applicable to the case a court of justice will presume

Although each state has the power to attach different legal consequences to a particular group of operative facts it would be, of course, highly inconvenient as well as unjust if that power were exercised in every instance. In the interest of a proper administration of justice a state will, therefore, frequently attach to the operative facts occurring in a foreign state the same consequences attached thereto by the law of such state.¹⁴² The circumstances under which this will be done constitute the subject matter of the conflict of laws itself.

In the light of the above discussion it must be apparent that the statements by courts and writers that some foreign law had the *exclusive* power to "create" a particular right are, under the actual conditions under which the rules of the conflict of laws are administered, totally misleading. Such phrases must be regarded merely as convenient forms of expressing the thought that the law of the forum under the facts of the case will grant to the parties the same rights as would be granted by the courts of a particular foreign state. There is grave danger, however, that the constant repetition of such phrases may induce the belief that the application of the foreign law is imposed upon the courts of the forum from without, when in truth the forum acts in perfect independence according to its own notions of what is right and proper. The statement criticized is perfectly consistent with the internationalistic theory of the conflict of laws,¹⁴³ but not with the fundamental conceptions of law entertained by the courts of England and the United States.

The problem has been discussed so far without reference to our American constitutions. The power of our legislatures and courts in the adoption of the rules of the conflict of laws is actually limited by various constitutional provisions—especially those relating to due process of law and the full faith and credit clause. So far as these have been or may be held to recognize the theory that rights arising out of acts or transactions without a state are the product of the exclusive operation of a particular law territorially governing the place where the

that the state would have enacted the proper rule of international law and by not enacting it left it to be understood that the municipal common law was in accordance with the obligation imposed on the state by the provisions of international law. 19 Columbia Law Rev. 495-460.

International law, according to Foulke, regulates the conduct of states and municipal law that of individuals. It cannot be said, therefore, accurately that any rule of international law is ever a part of the municipal law. 19 Columbia Law Rev. 457-458. Cf. Kaufmann, *Die Rechtskraft des internationalen Rechts*, 2.

142. Dicey, *op. cit.*, 8-10.

143. 1 Brinz, *Pandekten* (2nd ed.) 104.

operative facts occur, such theory is binding, of course, on principles of constitutional law. As all constitutional limitations are, however, in reality an integral part of the law of each state, it is therefore still perfectly accurate to say, even with respect to the law of the United States, that all rights are created by the forum.

In view of the foregoing developments, the qualification of legal transactions and the determination of domicile, *lex loci contractus*, and other points of contact upon which the application of foreign law depends, raise no problem of any special difficulty. If the conflict of laws of the forum says that the law of the decedent's domicile governs the distribution of his personal estate it must mean that in the estimation of the forum such rule accords best with the probable expectation of the decedent¹⁴⁴ or with the requirements of a good administration of justice, that is, with the requirements of international social life as conceived by the judge of the forum.

A similar reason must underly the adoption of the *lex loci contractus* in the law of contracts, and all other rules of the conflict of laws.

In the selection of the concept of "domicil", "*lex loci contractus*" and the like the courts of the forum might follow one of three conceivable methods. (1) They might attempt to find an international concept; (2) they might accept the concept of a foreign country; (3) they might choose the concept of their own municipal law or create one more in accordance with the needs of the case. Practically only the last two methods are available, for it is impossible with reference to any of the concepts under discussion to find one upon which the law of the different countries is agreed.¹⁴⁵ As regards the second method, the courts of the forum cannot follow, of course, the concept of the foreign state, the law of which is to be applied, for the application of the foreign law is dependent upon the preliminary determination of the concept. The forum *could* select some particular foreign law for the determination of the concept, but, as in the case of *renvoi*, there is ordinarily no reason why it should prefer a foreign concept to its own. Convenience has suggested, however, that the classification of property as movable and immovable be referred to the law of its situs. Where the law of one of two foreign states is applicable under the law of the forum and the laws of the two states agree upon the qualification of the legal transaction the acceptance of the common qualification by the forum may also seem expedient.¹⁴⁶ With

144. 28 Yale Law Journal 814.

145. See Kahn, 30 Ihering's Jahrbücher 67, 73, 98.

146. Concerning a similar exception with respect to *renvoi* see 10 Columbia Law Rev. 331-332; 27 Yale Law Journal 529-530.

these reservations the forum should determine the legal concepts for itself.

While the problem of qualifications is merely a phase of the general problem of the conflict of laws, so far as Anglo-American law and the nationalistic theory of the conflict of laws are concerned, it has been a source of great embarrassment to the internationalists. The internationalistic theory, which is followed by most of the Italian and French writers, proceeds on the assumption that there is but one system of the conflict of laws and that the rules thereof can be derived by a process of reasoning from some general principles which are deemed entitled to universal recognition and which must be accepted, therefore, as law.¹⁴⁷ But the discovery of a general problem in the conflict of laws, such as that presented by the theory of qualifications, which does not admit of an "international" solution, proves, even from their own view-point, the unsoundness of their theory. Hence the earnest efforts on the continent to overthrow Bartin's theory of qualifications or to reduce its operation to the narrowest limits.¹⁴⁸ So far as Despagnet's attempt to overthrow Bartin's theory is concerned, it manifestly begs the entire question. The qualification of a legal transaction cannot, in the nature of things, be determined by the law governing the transaction itself, inasmuch as the problem of qualifications, as it is understood in this article and as it is generally understood by the writers, is limited to the cases where the application of the foreign law depends upon the determination of the preliminary question. Under these circumstances it is impossible, as has been shown, to decide the preliminary question by the law governing the transaction itself.

Nor will the rules suggested by Gemma resolve the difficulty. The requirements of international life are too vague to furnish a standard for the solution of the problem under consideration.¹⁴⁹ The same objection may be raised also against the original theory of the conflict of laws developed by Jitta, except with respect to transactions which can be localized. So far as the question of the qualification of legal transactions is concerned, it would appear to coincide from Jitta's point of view with the general problem of the conflict of laws. Transactions

147. See *Supra*, foot-note 137. Of the foreign codes the Italian has gone furthest in the adoption of the internationalistic theory. See Art. 8, Prel. Disp. Civ. Code.

148. It must be admitted, however, that Bartin has unduly extended the application of his theory of qualifications. A number of examples cited by him do not involve a conflict of qualifications in the above sense. See Pillet, *Principes de droit international privé*, 105.

149. Cavaglieri, *Il Diritto Commerciale*, 1910, 50; Fedozzi, *Il Digesto*, 810; Venzi, *Foro italiano*, 1904, 1, 761.

not admitting of localization should be controlled, according to Jitta, by the international common rules, and in their absence, by the reasonable requirements of international social life. But these principles are not ready made, and it is difficult to see how an internationalization is possible of such concepts as "*lex loci contractus*", "capacity", "form", and the like upon which the application of foreign law is made to depend in the existing systems of the conflict of laws.¹⁵⁰ It is apparent, therefore, that the conception of the conflict of laws as *one* system which shall decide a case in the different countries in the same manner, is a Utopia which cannot be attained until there exist (1) a complete accord, not only with respect to the rules of the conflict of laws of the different countries, but also with reference to the various concepts or qualifications of legal relations upon which the application of the foreign law depends, and (2) an International Supreme Court with power to control the application of the concepts and qualifications to the facts of the case.

150. Jitta himself acknowledges that a judge cannot give to a juridical relationship very well a character opposed to that given to it by his national law. *La méthode*, 198.

5. THE QUALIFICATION, CLASSIFICATION, OR CHARACTERIZATION PROBLEM IN THE CONFLICT OF LAWS*

I

THE problem in the Conflict of Laws which today is known on the continent as the problem of "qualification" and in recent Anglo-American literature as that of "classification" or "characterization" was brought to the attention of students of the Conflict of Laws fifty years ago. In the very year of the founding of the YALE LAW JOURNAL, Franz Kahn published an article in Ihering's *Jahrbücher*¹ in which he pointed out that even if the rules of the Conflict of Laws in the different countries were the same, identity of results in individual cases would not follow because of latent conflicts inherent in the different systems of law.

Bartin dealt with the same problem in 1897, under the title *De l'impossibilité d'arriver à la suppression définitive des conflits de lois*, apparently unaware of the fact that Kahn had written on the subject before him. Bartin spoke of the problem as one of "qualification," and since that time the problem has been known on the continent by that name.²

There is no agreement among the writers concerning the type of questions properly belonging to a discussion of the qualification problem. Some use the term in a very broad sense and others in a narrower sense. I shall deal with the following classes of cases:

(1) The first class is one in which the fact situation is

* (1941) 50 Yale Law Journal 743.

1. Kahn, *Gesetzeskollisionen: Ein Beitrag zur Lehre des internationalen Privatrechts* (1891) 30 IHERING'S JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN PRIVATRECHTS 1, reprinted in LENEL & LEWALD, *ABHANDLUNGEN ZUM INTERNATIONALEN PRIVATRECHT* (1928) 1.

2. 24 Clunet 225. Beckett was the first to suggest that "classification" was linguistically a better term in English than "qualification." *The Question of Classification ("Qualification") in Private International Law* (1934) 15 BRIT. Y. B. INT. L. 46, n. 3. Falconbridge regards the term "characterization" as the most suitable English word. *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 239, n. 17. Nussbaum admits that "characterization" is linguistically more correct, but thinks that the internationally accepted technical term "qualification" should be given preference in a discussion of international import. Book Review (1940) 40 COL. L. REV. 1461, n. 2.

characterized under the law of the forum in a way different from that in which it is characterized under the *lex causae*—the law of the state or country with which it is connected. It may be regarded by one law as presenting a question of contracts and by the other law as a question of torts or property, by one law as a question of matrimonial property and by the other law as a question of succession, by one law as a question of succession and by the other law as a question of administration. Because of these divergencies in classification, different rules of the Conflict of Laws may become applicable. The problem is whether the qualification or characterization is to be made on the basis of the law of the forum or on that of the foreign law.

The same problem may also arise in situations in which the law of the forum and that of the foreign country differ as to whether certain property is movable or immovable, or in which they differ on questions of capacity and form. Are these questions to be resolved on the basis of the law of the forum or on the basis of the foreign law?

(2) The second class of cases involves the qualification of the connecting factor. A choice-of-law rule of the forum may determine legal relations by reference to the law of domicile, the law of the place of contracting, the law of the place of performance, or the law of the place where the tort is committed. The terms "domicile," "place of contracting," "place of performance," or "place of the wrong" are here connecting factors. The law of the forum and the foreign law involved may have the same connecting factors in their systems of the Conflict of Laws but different meanings may be attached to them. Here again the question is whether the meaning of these connecting factors should be determined in the light of the law of the forum or of the foreign law.

(3) A third class of cases arises after the applicable foreign law has been selected by the law of the forum. Here again the law of the forum and the foreign law may entertain different views as to whether a provision of the foreign law is to be regarded as substantive or procedural, a decision upon which the applicability of different laws may depend. How is this question to be determined?

It should be noted that in each of the above classes of cases the choice of law depends upon the qualification problem. If the problem is answered on the basis of the law of the forum, one law becomes applicable; if it is answered on the basis of the *lex causae*, another law determines the solution of the case. By limiting this discussion to these three classes, it will be possible to deal with the subject of qualification without running over

the entire field of the Conflict of Laws, and to give some sort of unity and cohesion to the treatment.

The assertion has been made that real qualification questions have been presented in only a few cases and that the problem is therefore devoid of practical interest.³ The enthusiastic discussion which the qualification problem has evoked has been ascribed as due largely to an unrealistic approach to the Conflict of Laws, principally exhibited by the adherents of the "logistic school." This school, it is said, attempts to perpetuate an international point of view in the Conflict of Laws on grounds of pure logic after it has become apparent that the law of nations cannot furnish an adequate basis.⁴ It is true that there have been, relatively speaking, only a few decisions in which a court has been clearly confronted with the necessity of choosing between the qualification of the forum and a qualification which would be different under the *lex causae*.⁵ As between states and countries belonging to the common law group, the categories in which fact-situations are grouped are generally the same, so that there is usually little occasion for the problem of qualification, although even here cases of this sort have presented themselves. The problem may readily arise, however, where the common law comes into contact with the civil law. It has practical, as well as scientific, importance and for that reason deserves consideration.

Both Kahn and Bartin concluded that no uniform solution could be found which would answer the above problems and that each forum would have to deal with them on the basis of its own internal law. Despagnet attempted to bring about uniformity by suggesting that the questions be referred to the *lex causae*, the law governing the legal transaction in question.⁶ Another writer, Gemma, realizing, no doubt, the impossibility of qualifying legal transactions by the *lex causae* (i.e., on the basis of some law which remains yet to be ascertained), pro-

3. Nussbaum, Book Review (1940) 40 COL. L. REV. 1461, 1468-1469.

4. *Id.* at 1469, 1470.

5. Nussbaum cites the following: *Harral v. Wallis*, 37 N. J. Eq. 458 (1883), *aff'd sub nom. Harral v. Harral*, 39 N. J. Eq. 279 (1884) (domicile); *Wood & Selick v. Compagnie Générale Transatlantique*, 43 F. (2d) 941 (C. C. A. 2d, 1930) (statute of limitations); *University of Chicago v. Dater*, 277 Mich. 658, 270 N. W. 175 (1936) (contract, *lex loci contractus*); *St. Louis-S. F. R. R. v. Fox*, 171 Ark. 103, 283 S. W. 31 (1926) (settlement of injury claim rescinded, mode of tender); *cf. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940) 157-222, 235-279 (hereinafter cited as ROBERTSON); *New England Mutual Life Ins. Co. v. Spence*, 104 F. (2d) 665 (C. C. A. 2d, 1939).

6. *Des conflits de lois relatifs à la qualification des rapports juridiques*, 25 Clunet 253, 261, 262; also PRÉCIS DE DROIT INTERNATIONAL PRIVÉ (1909) 353 *et seq.*

posed to reach uniformity among the different countries by qualifying legal transactions with reference to the requirements of international life.⁷

My own reactions to the problem in the light of the existing Anglo-American decisions were set forth in an article published in 1920, in which I agreed in the main with the conclusions of Kahn and Bartin, that there is generally no escape from applying the internal law of the forum to the qualification of legal transactions.⁸ In common with some foreign writers, however, I favored these exceptions: (1) that the qualification of rights affecting tangible property should be made on the basis of the *lex rei sitae*,⁹ and (2) that if the forum is interested in a case only insofar as it is the place of trial, the courts of the forum should follow a qualification agreed upon by the foreign states or countries concerned.¹⁰

Since 1920, the continental literature on the subject has assumed vast proportions.¹¹ The great majority of writers have been forced to agree with Kahn and Bartin; and Despagnet's view that the *lex causae* should determine the question has found but a very few followers.¹² Gemma's attempt to supplant the use of the internal law both of the *lex fori* and of the *lex causae* with a consideration of the international requirements has led to some important developments in recent years. The most outstanding effort in this direction has been made by Rabel.¹³ According to this eminent writer, it is a mistake to as-

7. PROPEDEUTICA AL DIRITTO INTERNAZIONALE PRIVATO (1899) 91, 111-112.

8. *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247.

9. See, in general, Falconbridge, *Contract and Conveyance in the Conflict of Laws* (1933) 81 U. OF PA. L. REV. 661, 663-666, 682-683; *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 543; *Conflict of Laws: Examples of Characterization* (1937) 15 CAN. B. REV. 215, 234; ROBERTSON 190 *et seq.*

10. *Accord*, ROBERTSON 177. If all the operative facts occurred in a single foreign country the law of that country would, of course, control without regard to whether the question was characterized in one way or another. The only exception to the rule would involve matters which the law of the forum would deem to be procedural.

11. For the bibliography, see ROBERTSON xxv-xxix; for a representation in English of the Italian viewpoint, see Meriggi, *Conflicts of Law—A Theoretical Approach* (1934) 14 B. U. L. REV. 319.

12. *E.g.*, WOLFF, *INTERNATIONALES PRIVATRECHT* (1933) 37; PACCHIONI, *DIRITTO INTERNAZIONALE PRIVATO* (2d ed. 1935) 173.

13. *Das Problem der Qualifikation* (1931) 5 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 241. Republished in revised form in Italian: *Il Problema della Qualificazione* (1932) 2 RIV. INT. DI DIR. PRIVATO E PROCESSUALE 97, and in French: *Le Problème de la Qualification* (1933) 28 REV. DE DR. INT. PRIVÉ 1.

sume that the sole background of a choice-of-law rule is the material law of the forum. Each country's rules of private international law are designed, in his view, to bring about international harmony between the law of the forum and that of all other countries, which can be attained only on the basis of more abstract notions than the concrete institutions of any particular country. Notwithstanding great diversities in the legal institutions of civilized countries, Rabel contends, they generally resemble each other sufficiently to permit the creation of more abstract notions which are valid for all national legislations. By way of illustration he takes the subject of "Guardianship" referred to in Article 23 of the Introductory Law of the German Civil Code, which he would understand as an abstract notion of guardianship derived from a comparative study of the institution in the entire civilized world instead of as referring merely to guardianship as understood in German internal law. Rabel admits that the method of comparative law will not resolve the problem of qualification in those cases where the differences between the legislations are so great that it is impossible to set up a compromise between the opposing points of view.

In 1930 Bartin¹⁴ added the following limitation to his original thesis that the *lex fori* governed the qualification of legal transactions: "After the law of the forum, on the basis of its own qualification, has chosen a foreign law as governing a particular legal institution, all subsidiary qualifications arising thereafter and necessary for the decision of the case are determined by the foreign law."

In 1932 Neuner¹⁵ published the first monograph on the subject, in which he rejected all the foregoing conclusions, the problem of qualification having, in his opinion, no right to existence. According to this author, the fundamental error consists in the assumption that there exists in each country a body of choice-of-law rules which are applicable to all situations that may be presented to a court, whereas there are actually only about twenty or thirty such rules, which are entirely inadequate for that purpose. The primary need is, therefore, the working out of additional rules, together with the further elaboration of the existing rules and their application in a

14. 1 PRINCIPES DE DR. INT. PRIVÉ (1930) 235; *La Doctrine des Qualifications et ses rapports avec le caractère national des règles du Conflit des Lois* (1930) ACADEMIE DE DR. INT., REC. DES COURS I, 565-620. See also Maury, *Règles Générales des Conflits de Lois* (1936) ACADEMIE DE DR. INT., REC. DES COURS III, 329, 493 *et seq.*

15. DER SINN DER INTERNATIONALPRIVATRECHTLICHEN NORM, EINE KRITIK DER QUALIFIKATIONSTHEORIE (1932).

manner calculated to bring about reasonable and just results.¹⁶

Recently, English and American writers also have begun to take interest in the problem of qualification. Beginning with 1934, a series of articles which dealt with the subject appeared. The earliest was by Beckett,¹⁷ who conceived the proper principle to be that the classification should be made on the basis of analytical jurisprudence and comparative law. Like Rabel, he felt that if the rules of Conflicts are to perform the function for which they are designed, they must be applied in a manner suitable for appreciating the character of the rules and institutions of all legal systems. The conception of these rules must, therefore, be of a very general character, which can be derived only from analytical jurisprudence and comparative law.

Beckett's conclusions were accepted by Cheshire in the first edition of his textbook in 1935.¹⁸ In the second edition in 1938,¹⁹ Cheshire draws a distinction between primary classification, arising before the law applicable to the case is selected, and secondary classification, which arises after the selection of such law.²⁰ He would determine the former with reference to the *lex fori* and the latter with reference to the *lex causae*. This division corresponds to Bartin's later views.

In 1940 Robertson published a comprehensive monograph on *Characterization in the Conflict of Laws*.²¹ As his work contains a detailed examination of the views of all Anglo-American writers, and of the most important continental writers, as well

16. Neuner says that the Conflict of Laws rules are not as general as they are believed to be and as they must be deemed to be if they are to govern all cases. In his view they are only general propositions, the extent and application of which remain to be worked out. The case of *Ogden v. Ogden*, *infra* p. 130, may serve as an illustration. According to Neuner the English courts never really adopted the broad rule that capacity to marry is governed by the law of domicile but adopted it only with respect to prohibited degrees of relationship. As the law of the place of celebration in all other respects governs marriage in English law, it would therefore also apply to the question of parental consent. Such an interpretation of the English law would, of course, eliminate the qualification problem.

17. *The Question of Classification ("Qualification") in Private International Law* (1934) 15 BRIT. Y. B. INT. L. 46.

18. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (1st ed. 1935) 14.

19. *Id.* (2d ed. 1938) at 24-25.

20. CHESHIRE, *PRIVATE INTERNATIONAL LAW* (2d ed. 1938) 30, 37. For a discussion of secondary classification, see p. 753 *et seq. infra*.

21. For other articles on the subject by English and American writers, see Falconbridge, *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 537; *Conflict of Laws: Examples of Characterization* (1937) 15 CAN. B. REV. 215; *Renvoi, Characterization and Acquired Rights* (1939) 17 CAN. B. REV. 369; Unger, *The Place of Classification in Private International Law* (1937) 19 BELL YARD 3; Cheatham, *Internal Law Distinctions in the Conflict of Laws* (1936) 21 CORN. L. Q. 570.

as a discussion of most English and American cases presenting fact situations involving the problem of characterization, our further development of the subject will center its attention upon the conclusions reached by this author.

II

Falconbridge was the first writer to suggest that the problem of qualification should be considered in connection with each of the different stages presented in the solution of a Conflicts problem.²² Before a judge can select the choice-of-law rule applicable to a situation presented to him, he must know whether the question relates to contracts, torts, property, succession, or some other field. He will usually be quite sure of the category to which the question belongs. Many differences do exist, however, between the different systems of law in the classification of legal transactions, and the question is what a judge is to do when confronted with a situation treated variably in different systems. Most writers seem to feel that in the present stage of our law there is no practical alternative to the application of the law of the forum.²³ It is conceded that this is an undesirable state of affairs because different solutions will be reached in different countries having identical Conflicts rules. Vigorous efforts have therefore been made to avoid this conclusion, but, except in one or two directions,²⁴ no practical escapes have been found.

Robertson is in general agreement with the above views but contends that further clarification is necessary concerning the process of qualification by the *lex fori*. He makes particular objection to the statement that the qualification must be on the basis of the "internal" law of the forum.²⁵ Unger called attention to this point in connection with two English cases.²⁶ One involved a foreign contract unsupported by consideration. The contract, being governed by the foreign law and valid there, was enforced in England.²⁷ If the court had applied the strictly

22. *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 236.

23. Falconbridge is in accord, but he urges that in order to bring about reasonable economic or social results the process of selecting the proper law be rendered as flexible as possible. He suggests, therefore, that the characterization should be made in the light of all potentially applicable rules of law. *Renvoi, Characterization and Acquired Rights* (1939) 17 CAN. B. REV. 369, 374-375.

24. See *infra*, p. 124.

25. ROBERTSON 29 *et seq.*

26. Unger, *supra* note 21, at 7.

27. *Re Bonacina* [1912] 2 Ch. 394 (C.A.).

internal law, which required that a contract be supported by consideration, the fact-situation presented could not have been characterized as a contract. Unger holds, therefore, that it is sufficient if the case falls within the "analytical framework" of the legal system of the forum. The second case recognized the validity of a Russian marriage in England.²⁸ As a Russian marriage is terminable at will, it does not correspond to the English notion of marriage. Unger would say that the Russian marriage was rightfully recognized in England because it fell within the English analytical framework concerning marriage. Robertson regards Unger's formulation of the rule as still too narrow because it does not include cases involving foreign institutions entirely unknown to the internal English law. Such a situation was presented to the House of Lords in the case of *DeNicols v. Curlier*.²⁹ A French couple came to reside in England. At the husband's death, the widow claimed one-half of all the property acquired by the husband during the marriage, including the property acquired in England, basing her claim on the French matrimonial property régime. No such property régime was known to the internal English law. The House of Lords felt that the French law should control and, in so holding, recognized a foreign institution which did not exist in England and so could not fall within the framework of the English internal law. Robertson therefore concludes that, insofar as the characterization of foreign legal situations is determined by the *lex fori*, the term does not mean the strictly internal law of the forum, but a wider concept which needs to be worked out for purposes of the Conflict of Laws.³⁰ This conclusion clearly seems to be correct.

In my article dealing with the statute of frauds,³¹ published in 1923, I was already aware that qualification in accordance with the internal law of the forum would not do. In most instances the categories of internal law will also suffice for purposes of the Conflict of Laws but there are situations where they may not. In the Article referred to, I stated that the statute of frauds might well be classified as procedural for purposes of internal law and yet be substantive from the point of view of the Conflict of Laws.³² The clearest example of such a distinction in Anglo-American law relates to "penal" laws. There have been many American decisions holding that a stat-

28. *Nachimson v. Nachimson* [1930] P. 217.

29. [1900] A. C. 21.

30. ROBERTSON 89.

31. *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311.

32. *Id.* at 330.

ute which gives a plaintiff damages in excess of the amount of his loss, or without reference to such amount or the cause of the loss, is a penal statute. The United States Supreme Court³³ and the English Privy Council³⁴ have held, however, in *Huntington v. Attrill* that, for purposes of the Conflict of Laws, an international test should be adopted, restricting the definition of a penal law to a law punishing a person for the infraction of a public law. Here we have two distinct tests of what constitutes a penal law, one for internal law purposes and the other for questions of the Conflict of Laws. Similarly, as regards the qualification of legal transactions, the classification or characterization may have to be upon a broader or narrower basis than the internal law of the forum if it is to be suitable for the needs of the Conflict of Laws. In certain cases it may suffice, as suggested by Unger, that the transaction fall within the analytical framework of the internal law of the forum. In other cases it may not, so that wider categories may have to be discovered.³⁵ To this end a knowledge of Comparative Law may be useful.

III

Let us consider next the characterization of the connecting factor. After having reached the conclusion that the situation presented to the court is one of succession, or one of contracts or torts, the judge will be directed by the choice-of-law rules of the forum to apply the law of the domicile, the *lex loci contractus*, the *lex loci solutionis*, or the *lex loci delicti*, respectively. He may find, however, in a given case that different meanings are attached to such connecting factors. For example, the English courts recognize the reverter doctrine in connection with domicile. Our courts do not. In the English law a married woman cannot acquire a separate domicile. Under our law she may. Under our law a contract by correspondence is deemed concluded when the letter of acceptance is posted. On the continent and in Latin-America, the formation of the con-

33. *Huntington v. Attrill*, 146 U. S. 657 (1892).

34. *Huntington v. Attrill* [1893] A. C. 150 (P.C.).

35. In the cases used by way of illustration above, the characterization of the situation as "contract," "marriage," or "penal" may not have determined the choice of law within the strict meaning of the qualification problem as defined in this article. The question was in fact only whether a wide or a narrow meaning should be given to the terms in connection with the enforcement of the foreign "contract," or "penal" liability, or the recognition of the foreign "marriage." The same reasoning is valid, however, where a choice of law is dependent upon the qualification problem as herein defined.

tract is not infrequently postponed to the time when the answer reaches the offeror. Differences exist also with respect to the place of performance of a contract or the place where a tort is committed. On the continent the qualification of nationality as a connecting factor is of great importance because in many countries the *lex patriae* has been substituted for the *lex domicilii* in the determination of the personal law. As the laws governing the acquisition and loss of nationality vary considerably in the different countries, by what law is the judge to determine the nationality of the parties before him? I dealt with this problem in an earlier Article,³⁶ and, as it has little practical importance in the Anglo-American system of the Conflict of Laws, it need not be reconsidered here.

Apart from the qualification of "nationality," it may be said that there appears to be general concurrence, at least among Anglo-American courts and writers,³⁷ that the law of the forum must determine the meaning of the connecting factors. Where a person lives in a single foreign country, it is, of course, quite simple to determine his domicile with reference to such foreign law. Difficulties would arise, however, if he were to live in several foreign countries unless there were agreement between those countries regarding his domicile. So far as the question has been presented to Anglo-American courts, they have determined domicile in accordance with the *lex fori*.³⁸ Whether they would accept the common characterization of two foreign states to which the factual situation was exclusively related, the law of the forum being interested solely as the place of trial, is not certain.³⁹ The foreign characterization might well be adopted in this situation in the interest of uniformity, as there is no inescapable necessity for applying the law of the forum. Similarly, with respect to the remaining factors. Thus in a contract case, if the law in a given jurisdiction directs the judge to apply the law of the place of contracting and the contract is deemed concluded by the *lex fori* in the state or country in which the acceptance is mailed and the law of the foreign state regards it as formed when the acceptance reaches the offeror, the law of the forum would necessarily have to control. However, if the law of the forum should have no other relation to the case than as the place of trial, and the laws of

36. *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247, 250-252.

37. For a discussion of the English and American cases, see ROBERTSON 224-229.

38. See ROBERTSON 108; Lorenzen, *supra* note 36, at 248-250; RESTATEMENT, CONFLICT OF LAWS (1934) § 10.

39. See RESTATEMENT, CONFLICT OF LAWS (1934) § 10, *caveat*.

the foreign countries between which the negotiations were carried on should agree that a contract is completed at the place where the acceptance reaches the offeror, uniformity in the Conflict of Laws would be promoted by accepting the foreign characterization.

Where the connecting factor has significance in the internal law of the country as well, it should conform for the purposes of the Conflict of Laws, to the international requirements, instead of being limited to the internal law concept. Our courts have shown an awareness of this fact in connection with domicile when they contrast "municipal" domicile with domicile for purposes of the Conflict of Laws.⁴⁰

Robertson agrees that the connecting factor should generally be determined by the law of the forum. As he is inclined to accept the renvoi doctrine in the Conflict of Laws, he would, insofar as that doctrine applies, allow an exception to the above rule and accept the characterization of the connecting factor by the foreign law.⁴¹ He gives as an illustration the case of an American citizen with a domicile of origin in Iowa who acquires a domicile of choice in England. He then decides to give up his English domicile and return to the United States to end his days. He dies on his way home. An English court is called upon to administer his estate. By English law the decedent died domiciled in Iowa because the domicile of origin automatically reverted upon the abandonment of his English domicile. By Iowa law, the decedent died domiciled in England because his English domicile of choice continued until a new domicile was established in Iowa. If, in the light of *In re Annesley*,⁴² the English judge is to decide the case in the same way as the judge sitting in the court of the domicile would do, he will have to follow the reference of Iowa law to English law in the matter of domicile. He would thus have to accept the determination of the connecting factor—domicile—by the Iowa court, instead of reaching a conclusion on the basis of the English law of domicile.

The case of *University of Chicago v. Dater*⁴³ may be explained on this basis. A married woman in Michigan signed a note, dated and payable in Chicago, and secured by Illinois real

40. "This is an illustration applicable to a change of municipal domicile. But the domicile required by the divorce statute seems to be more analogous to what is termed by Mr. Jacobs, in his work on Domicile, a quasi-national domicile." *King v. King*, 74 N. J. Eq. 824, 827, 71 Atl. 687, 688 (1908).

41. ROBERTSON 110.

42. [1926] Ch. 692.

43. 277 Mich. 658, 270 N. W. 175 (1936).

estate. According to Michigan law, the contract was deemed concluded in Illinois. But when it was proved that under the Illinois rule as to the formation of contracts the contract was deemed concluded in Michigan, the Michigan court applied its own rule that the married woman was under a disability to enter into the contract. The majority opinion does not disclose any awareness of the problem involved. The dissenting opinion, on the other hand, clearly expresses the usual view toward this question. If under the Michigan Conflicts rule the law of the place where the contract was technically made determined the capacity of married women to contract, the Michigan court was obliged, of course, to ascertain where under the circumstances of the case the contract was made. This question the court resolved correctly on the basis of the Michigan decisions. The connecting factor was thereby established and there was no occasion to determine it over again on the basis of Illinois law. Therefore the court should have applied the Illinois law governing the capacity of married women to contract unless it was prepared to accept, with respect to contracts, the renvoi doctrine in the *In re Annesley* sense. Under the *Annesley* rule, the Michigan court should decide the case as the Illinois court would. It would be immaterial how the Illinois court reached its conclusion that Michigan law was applicable: whether it did so because its Conflict of Laws rule regarding capacity to contract was different from that of Michigan (it might determine such capacity with reference to the law of the domicile of the married woman), or whether the Conflicts rule regarding capacity to contract was the same as the Michigan rule but the Illinois court disagreed with the Michigan court's characterization of the connecting factor as the place of contracting.

A word of caution may be in order here. Although a goodly number of decisions and dicta in England seem to accept renvoi, there is no clear-cut decision by a higher court which really establishes the doctrine in English law. It should also be remembered that the English renvoi cases have been almost exclusively concerned with matters of succession where the English rule of domicile came into conflict with the continental rule of nationality. Moreover, even as limited to succession cases, the *In re Annesley* rule is only one of several interpretations which the English lower courts have given to the renvoi doctrine. Uniform results arose in *In re Annesley* from the fact that the French courts did not interpret their renvoi doctrine in the way the English court did. If the interpretation given to the renvoi doctrine by *In re Annesley* is the true one on principle, it must be correct for every other country. If the French courts had interpreted their renvoi doctrine in the

same way as *In re Annesley*, they would have had to decide the case in the same manner as an English court, and if an English court had to decide in the same way as a French court, no conclusion could have been reached. As long as some countries apply the renvoi doctrine in the French way, which is the traditional one, uniformity would be reached, with reference to those countries, on the basis of the *In re Annesley* doctrine. Personally, I cannot approve a doctrine which is workable only if the other country rejects it. Apart from that, I do not favor handing over our Conflicts problems to so-called experts on foreign private international law. It is difficult enough to get accurate expert testimony with respect to foreign municipal law, but such testimony is much more unreliable with respect to foreign Conflict of Laws. For these reasons I should still regard the general acceptance of the renvoi doctrine in our law as most unfortunate.

IV

We come now to the third step in the solution of a Conflict of Laws problem, which is called by Robertson "The delimitation and application of the proper law."⁴⁴ In a case involving the distribution of personal property upon death, an Anglo-American court would find the connecting factor to be the decedent's domicile at the time of death and, characterizing this term on the basis of the *lex fori*, it might conclude that the domicile was in France. In a contract case, let us assume that a court has found it to be the settled law of the state that the law of the place of contracting controls, and, characterizing this connecting factor on the basis of the *lex fori*, let us assume that the court has found that the place of contracting was in France. In both instances the question will then be what is *the* French law that is to be applied? If the French law should have rules of the Conflict of Laws different from those of the forum, applying the national law of the decedent to questions of succession and the intention of the parties as governing the validity of the contract, we should be faced again with the renvoi doctrine, that is, whether the law of the forum should regard its Conflicts rules as referring to the French municipal or internal law (law of succession or contracts), exclusive of its rules of the Conflict of Laws, or the French law in its totality, including its rules of the Conflict of Laws. This assumes, of course, that the question is not regarded by the courts of the forum as one of procedure in the Conflicts sense. If it should be so regarded, the procedural rules of the forum would apply.

44. ROBERTSON 17-18.

This is not the place to go further into the subject of renvoi in general. So far as it bears upon the question of characterization arising in connection with the third step in the solution of a Conflicts problem—the application and delimitation of the foreign law—it operates in the same manner as it operates in dealing with the qualification of the connecting factor. In other words, if the renvoi doctrine in the *In re Annesley* sense is adopted by the law of the forum, the court would have to regard itself in the above cases as sitting in France and decide the case as a French court would decide it.⁴⁵ If a question of qualification were involved, it would mean, of course, that the law of the forum would follow the decision of the French court. To the extent, therefore, that the law of the forum accepts the renvoi in the *In re Annesley* sense, any qualification arising in the application or delimitation of the French law would actually be determined by the *lex causae*.

As the renvoi doctrine has not been recognized in American law, except for certain purposes, let us consider the characterization problem arising in connection with the third step in the solution of a Conflict of Laws problem (the application and delimitation of the foreign law) on the assumption that the Conflicts rules of the forum apply strictly to the internal law of the foreign country and not to its Conflicts rules. Robertson calls this the problem of secondary classification and argues that secondary classification should be on the basis of the *lex causae*—on principle, and not merely by way of exception, as in the case of primary characterization. He thus accepts Bartin's later generalization,⁴⁶ according to which the law of the forum disinterests itself in the case after it has chosen the foreign law and turned the case over to such law, so that any problem of characterization arising in the application of the foreign law will be governed by that law. Cheshire drew the same distinction between questions of characterization arising before and after the foreign law has been chosen by the *lex fori*. We find, however, that these supporters of the secondary classification theory do not agree among themselves as to the types of cases which are subject to secondary characterization. Robertson goes beyond Cheshire, by including in this class the

45. Falconbridge is of the opinion that the renvoi doctrine should be recognized with respect to status, and for that reason he would justify characterization of status on the basis of the foreign law governing such status. *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 544-546; *Conflict of Laws: Examples of Characterization* (1937) 15 CAN. B. REV. 215, 244.

46. Bartin, *La Doctrine des Qualifications et ses rapports avec le caractère national des règles du Conflit des Lois* (1930) ACADÉMIE DE DR. INT., REC. DES COURS I, 565, 608.

question whether a legal provision relates to capacity or formalities.

The two cases generally discussed in this connection by writers on the qualification problem are a Dutch will case and the English case of *Ogden v. Ogden*.⁴⁷ The former involved a holographic will made by a Hollander in France,⁴⁸ the Dutch law prohibiting Hollanders from executing their wills in the holographic form either at home or abroad.⁴⁹ Bartin originally regarded this situation as one in which no uniformity of decision could be reached, on the assumed ground that from the Dutch point of view the question would be one of capacity while from the standpoint of French law it would be one of formality.⁵⁰ The Dutch courts would regard the will as void, whereas the courts of the country in which the will was executed or the courts of third countries might apply the law of the place of execution to matters of formality and so hold the will valid. This viewpoint has had the approval both of courts⁵¹ and writers.⁵² Cheshire regards the problem as one of primary characterization, to be determined on the basis of the *lex fori*.⁵³ According to Robertson's theory of secondary characterization, if such a will, disposing of movable property, is executed in England, and the English courts regard the law of domicile as governing capacity to make a will and the law of the place of execution as governing formalities, the courts should inquire of the Dutch law what it understands by capacity and of the English law what it means by formalities.⁵⁴ Others have denied the validity of the will anywhere, either because they regarded the Dutch legislation as affecting *capacity* and therefore governed by the testator's personal (Dutch) law⁵⁵ or, conceding

47. [1908] P. 46.

48. A similar question is presented by the prohibition of joint wills, which is regarded by some as appertaining to capacity and by others as appertaining to form.

49. Holland: CIVIL CODE (1921) art. 992.

50. 24 Clunet 225, 229-230.

51. *France*: Cass. (Civ.) Aug. 25, 1847, Dalloz Jurisprudence, 1847 I. 273; *Germany*: Hans. OLG, May 2, 1917, Hans. G.Z., 1917, Beibl., 252.

52. 1 ARMINJON, PRÉCIS DE DR. INT. PRIVÉ (2d ed. 1927) 135; 6 STAUDINGER'S KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCHE (Raape's 9th ed. 1931), part II, 18. See also PILLET & NIBOYET, MANUEL DE DR. INT. PRIVÉ (1928) 503; DESPAGNET, PRÉCIS DE DR. INT. PRIVÉ (5th ed. 1909) 354; SURVILLE, COURS ÉLÉMENTAIRE DE DR. INT. PRIVÉ (7th ed. 1925) 19, n. 3.

53. PRIVATE INTERNATIONAL LAW (2d ed. 1938), 34 *et seq.*

54. ROBERTSON 238, 244-245.

55. In favor of this view: *France*: Dufour v. Dufour, Trib. Seine, Aug. 13, 1903, 31 Clunet 166; *Belgium*: Willemsen v. Brands, Trib. Brussels, July 21, 1886, 14 Clunet 495; Isabaert v. Barbiaux, Trib. Termonde,

that the Dutch statute affected *formalities*, because they did not attribute an absolute character to the rule that the law of the place of execution governed formalities, but regarded it, with respect to Dutch nationals, as subject to modification by the national legislation.⁵⁶ Bartin seems to have adopted this view in his later years.⁵⁷ From the standpoint of the Dutch law, the will would be invalid without any need of characterizing the legislation as relating to capacity or to form.⁵⁸ The case presented, therefore, is in reality not at all a problem of differences in qualification.

The facts in *Ogden v. Ogden* were as follows: In 1898 a marriage was celebrated in England between Sarah, a domiciled English woman, and Philip, a domiciled Frenchman, who was 19 years of age. In 1901 this marriage was annulled by a French court on the ground that the consent of Philip's surviving parent had not been obtained as required by French law. Philip subsequently married a French woman in France. Sarah thereupon, in 1903, instituted a suit in England for the dissolution of her marriage with Philip on the ground of his adultery and desertion. This suit was dismissed for want of jurisdiction because Philip was domiciled in France. In 1904 Sarah, describing herself as a widow, married Ogden, a domiciled Englishman, in England. In 1906 Ogden obtained an annulment of the marriage on the ground that at the time of their marriage Sarah was married to Philip. So far as *Ogden v. Ogden* held that the French decree of nullity was not entitled to recognition in England, it is deemed overruled by subsequent English cases. The case is principally of interest because of the problem of qualification involved in it and the decision that the requirement of parental consent to the marriage was to be characterized as a part of the formalities, so that the marriage between Sarah and Philip was validly contracted from the English point of view.

Various solutions of the *Ogden* problem have been suggested. Beckett would give effect to all French provisions, though relating to formalities abroad, for the reason that they are mat-

March 24, 1907, 35 Clunet 885; *Froidbise v. Horsten*, App. Brussels, Jan. 9, 1937, Pas. 1937, II, 56.

56. *France*: *Leeuwn v. Guilbot*, Trib. Seine, Feb. 19, 1927, 55 Clunet 707; *Italy*: *Ogtrop v. Formica*, App. Genoa, Aug. 4, 1891, 20 Clunet 955, *aff'd*, Cass. Turin, Apr. 12, 1892, 21 Clunet 1083. This would be tantamount to the recognition of a new choice-of-law rule with respect to formalities.

57. Bartin, *supra* note 46, at 576.

58. KOSTERS, *HET INTERNATIONAAL BURGERLIJK RECHT IN NEDERLAND* (1917) 643; Amsterdam, Rechtbank, June 19, 1924, 12 Bull. de L'institut Intermédiare International 118.

ters of family law and intended for the protection of family interests.⁵⁹ Cheshire⁶⁰ and Falconbridge⁶¹ insist that the qualification of the French requirement must be according to the *lex fori*. Says Cheshire:

"In order to reach a decision, he [the English judge] examines the terms in which the rule is expressed, and he considers the construction put upon it by French expert witnesses, but he must ultimately determine its true nature by an application of the canons and principles recognized in England. If the rule reads as follows:

'The son who has not reached the age of 25 years cannot contract marriage, without the consent of his father and mother,'

it would seem that it must be classed as affecting the capacity of the parties. . . . If an English judge applies French law merely because a French lawyer would regard the question *sub judice* as one of capacity, though in England it is regarded as one of formal validity, the result is the application of a legal system which in this country is considered inappropriate in the matter at hand."⁶²

If the English rule that capacity to contract a marriage is governed by the law of domicile is a general one, its characterization should be on the basis of the *lex fori* and not on that of the *lex causae*. The ultimate question is whether French or English law is to be applied to the matter of consent of parents. The answer to the question depends upon whether the consent of parents is to be characterized as appertaining to capacity or form. This question the law of the forum must decide for itself. If the English judge were to submit to the French view in this situation and regard a French provision as one of capacity when from the English point of view it is a matter of form, he would, as Cheshire points out in the above quotation, apply a law which is considered inappropriate by the law of the forum. He would apply French law because of the French characterization when he should apply English law according to the Eng-

59. Beckett, *The Question of Classification ("Qualification") In Private International Law* (1934) 15 BRIT. Y. B. INT. L. 46, 78.

60. PRIVATE INTERNATIONAL LAW (2d ed. 1938) 36.

61. *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235, 249 (maintains that parental consent cannot be characterized in the abstract; that it may be a question of formality in one context and capacity in another).

62. PRIVATE INTERNATIONAL LAW (2d ed. 1938) 36, 37. In applying the foreign law selected by the forum, the court should take into consideration all relevant provisions, though they may appear in some other title or division of the Code.

lish characterization. As well might the English judge prefer the French to the English rules for the choice of law, *i.e.*, accept the renvoi doctrine. Robertson appears to favor the renvoi and this no doubt accounts for his suggestion that in the case of multiple qualification (where, for example, capacity is governed by the law of domicile and formalities by the law of the place where the transaction occurs), the characterization should be on the basis of the *lex causae* (*i.e.*, the domiciliary law should characterize capacity and the *lex loci actus* should characterize matters of form). That suggestion is unacceptable.

Both Cheshire and Robertson assume that there is an established rule in the English Conflict of Laws that capacity to marry is governed by the law of domicile and formalities by the law of the place of celebration. If the English rule that the law of domicile controls the capacity to marry were of a more restricted character so as to be limited (as submitted by Neuner and Rheinstein⁶³) to degrees of relationship, all other matters being subject to the law of the place of celebration, the marriage in *Ogden v. Ogden* would of course have been valid in England, but no question of characterization would have been presented.

The problem remains whether or not questions of qualification which may arise after the foreign law has been chosen by the *lex fori* should be referred to the foreign law (*lex causae*) as Bartin, Cheshire and Robertson advocate. It goes without saying that if the qualification problem merely involves the application of the foreign internal law, the foreign law should control. The law of state X, which has been chosen by the law of the forum as governing a contract or tort, necessarily governs any subsidiary question relating to such contract or tort; for example, whether a particular contract is to be regarded as a loan or deposit, or whether the master is responsible for the torts of his servants, and what is meant by master and servant in that connection. It is also reasonable that if the French Civil Code permits Frenchmen to execute wills in the "authentic" form abroad, the requirement may be deemed satisfied if the nearest equivalent existing in the place of execution is complied with (for example, where a will is executed in England before witnesses).

Does it follow that the *lex causae* should likewise determine whether a particular provision of the foreign law relates to substance or procedure? The principle examples of secondary qualification given by Cheshire relate to substance and procedure. Robertson also dwells at length upon this subject in his

63. See Neuner, *op. cit. supra* note 15. Compare also Rheinstein, Book Review (1938) 8 BROOKLYN L. REV. 253, 257.

discussion of secondary characterization. According to these writers, if the law of the forum has decided that a contract or a tort is governed by the law of state *X* and no rules of procedure of the forum are involved, such questions as whether a writing required by the law of state *X* affects the formation and validity of the contract or relates to evidence, whether by the law of state *X* the running of the statute of limitations discharges a contract or merely bars the remedy for its breach, whether the failure to give notice to the wrong-doer required by the law of state *X* will discharge the cause of action or whether it is merely a procedural requirement for the bringing of the suit, should be governed by the law of state *X*. What are the consequences of this view? According to the proponents of the secondary classification theory, if the law of the forum says that the statute of limitations is substantive and the law governing the contract says it is procedural, the action would be maintainable, even though it is not brought within the time prescribed by either law.⁶⁴ The statute of limitations of the forum would be applicable only to contracts governed by the law of the forum and the foreign statute of limitations, being procedural, would be disregarded, as the courts do not enforce the procedural laws of another country. The same would be true in the case of the statute of frauds. If the law of the forum says it is substantive and the law governing the contract says it is procedural, the contract would be enforceable upon reasoning similar to that used in connection with the statute of limitations, although neither statute is satisfied.⁶⁵ If the law

64. This is the view taken by Cheshire and Robertson. To the same effect with respect to the Statute of Frauds, see WHARTON, *CONFLICT OF LAWS* (3d ed. 1905) 1445. If it should be asked why, under the secondary classification theory, the characterization by the foreign law of the Statute of Limitations or of the Statute of Frauds as procedural was not binding upon the courts of the forum so as to make the statute of the forum applicable, the answer is, because the law of the forum, in submitting the matter to the foreign law, has thereby already decided that the question is one of substance. Procedural matters are always subject to the law of the forum.

65. The German Supreme Court took this view in a suit upon a Tennessee contract. The German statute (3 years) did not apply because it was regarded as substantive and thus applicable only to contracts governed by German law. The Tennessee statute (6 years) was found to be procedural from the viewpoint of American law and hence not applicable. There being no statute of limitations applicable to the situation, the action was allowed. German Supreme Court, January 4, 1882, 7 RG 21. Later cases have taken the view advocated in this Article: that the foreign statute be qualified on the basis of the law of the forum. After a detailed comparison between the effects of the foreign statute and the German statute of limitations the court found that they were substantially the same. That being the case, it felt that the case could be dealt with on the

of the forum should have a substantive rule requiring notice of the injury suffered by the plaintiff and the law of the place where the injury arose should regard the requirement of notice as a matter of procedure, the action would lie, although no notice was given, that is, neither law was complied with. If the law of the forum should regard the burden of proof as substantive and the law of the state where the wrong was committed should regard it as procedural, there would theoretically be no law applicable to the burden of proof.⁶⁶

Results like these would seem sufficient to prove the unsoundness of the secondary classification theory. If an applicable foreign statute of frauds or statute of limitations has not been satisfied, the plaintiff has no right to damages for the breach of the contract under the law governing the contract. If this is so, there is no reason why the plaintiff should be given greater rights in any other state. The very object of the rules of the Conflict of Laws is to keep the rights of parties the same, regardless of the state or country in which the litigation may take place. If the law of the forum chooses the law of state *X* as governing the contractual rights of the parties, it does so on considerations of fairness and justice. If the law of the foreign state or country says that the plaintiff never had an enforceable right, he should not have an enforceable right anywhere else. An unenforceable right is equivalent for purposes of the Conflict of Laws to no right. The statement that courts should enforce foreign substantive rights but not foreign procedural laws has no justifiable basis if the so-called procedural law would normally affect the outcome of the litigation. If there is any sense in the proposition that the law of state *X* governs the contract—and if there is no sense in that proposition, the entire Conflict of Laws should be scrapped—it must mean that all municipal laws of the state normally affecting the rights of the parties (that is, the recovery of damages), such as the statute of frauds and the statute of limitations, should control.

The parties cannot, of course, expect the courts of the forum to adapt their legal machinery to that of any foreign state or country. So far as the detailed steps and modes of procedure

basis of German law, which had rejected the notion, formerly prevailing, that the statute of limitations belongs to the law of procedure. RG, Nov. 21, 1910, *Juristische Wochenschrift* 1911, 148; July 6, 1934, 145 RGZ 121.

Nussbaum regards the analysis and appraisal of the integration process—the process of determining whether the foreign institution conforms substantially to that of the forum—as constituting the central problem of qualification, which is rarely touched upon by the writers on the subject. Book Review (1940) 40 *COL. L. REV.* 1461, 1465; cf. Wood & Selick v. *Compagnie générale Transatlantique*, 43 F. (2d) 941 (C. C. A. 2d, 1930).

66. In this predicament the court would probably apply the law of the forum.

are concerned, courts can operate only in their accustomed manner. A Connecticut court cannot without undue inconvenience try a case in accordance with New York procedure and it would be quite impossible to try a case in accordance with a continental or Latin-American system of procedure. The law of the forum is thus obliged, on grounds of necessity, to apply its own procedural laws and disregard those of other states. However, foreign statutes of limitations and statutes of frauds do not fall within that category, for they can be proved as readily and without greater inconvenience than any other foreign law that may be applicable under the rules of the Conflict of Laws of the forum.

V

We have arrived, then, at the following conclusions:

(1) The question whether a situation is to be classified as one of contracts, torts, succession, matrimonial property, and the like, is necessarily to be determined by the law of the forum. The foreign institution need not conform strictly to the internal law of the forum; it should be sufficient if it falls within its analytical framework or within some special concept worked out for purposes of the Conflict of Laws.

(2) The same conclusion applies to the characterization of the connecting factor. However, to the extent that the law of the forum accepts the *renvoi* doctrine in the *In re Annesley* sense, the characterization of the connecting factor by the foreign law would prevail.

(3) As the law of the forum is chosen in the above classes of cases for want of any other practicable rule, it should be abandoned whenever some other reasonable solution can be found. For that reason the question whether tangible property is movable or immovable should be determined on the basis of the law of the situs. Again, if the fact situation is exclusively connected with foreign states or countries, the law of the forum being interested solely as the place of trial, a common characterization placed upon it by the law of all the foreign states or countries involved should be accepted.

To the extent that the law of the forum understands its Conflicts rules in the *renvoi* (*In re Annesley*) sense, the adoption of the characterization made by the foreign law would follow.

(4) The suggestion that the *lex causae* should determine all questions of characterization arising after the foreign law has been selected by the *lex fori*—the “secondary characterization” of Cheshire and Robertson—is not to be approved. As in the preceding cases, such questions of characterization should be resolved on the basis of the *lex fori*.

6. HUBER'S DE CONFLICTU LEGUM* ¹

OF THE vast number of treatises on the Conflict of Laws Huber's "De Conflictu Legum Diversarum in Diversis Imperiis" ² is the shortest. It covers only five quarto pages; and yet it has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work. No other foreign work has been so frequently cited. Story himself relied upon Huber more than upon any of the other foreign jurists. Indeed, Lainé³ goes so far as to say that Story's celebrated work on the "Conflict of Laws" is in reality nothing but a "paraphrase" of Huber.

In the estimation of continental jurists, Huber does not occupy such a prominent position. He is considered one of the lesser writers on the subject. Whence comes this difference in the appreciation of Huber? Before this question is answered it will be profitable to set forth very briefly Huber's views on the subject of the Conflict of Laws and to compare them with the views of the other leading statutists.

I

Huber has formulated his views concerning the legal basis upon which, in his opinion, the rules of the Conflict of Laws rest in the following three maxims:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.

* (1919) 13 Illinois Law Review 375.

1. "Ulrich Huber was descended from a Swiss family. His grandfather entered the military service of The Netherlands. Ulrich was born at Dokkum in 1636. He studied at the universities of Franeker and Utrecht. In 1657 he became professor of law at the University of Franeker. He was twice offered the chair of law at Leyden, but refused each time. He was afterwards appointed as a member of the Provincial Court at Leeuwaarden, but shortly before his death he returned to Franeker. He died in 1694, or four years before Voet published his Commentary.

"Ulrich Huber was regarded as one of the first rank in the Dutch school of law. His principal works are "De Jure Civitatis"; "Praelectiones Juris Civilis"; "Digressiones Justinianae"; "Eunomia Romana"; and the "Hedendaegse Rechtsgeleertheit zoo elders als in Frieslandt gebruikelyk." In addition to these works he wrote a considerable number of works on theological and philosophical subjects": *Wessels*, "History of the Roman-Dutch Law," 316-17.

2. It constitutes a part of title 3, part 2, book 1, of Huber's "Praelectionum juris civilis, tomi tres."

3. *Clunet*, *Journal du droit international privé*, XXIII, 486.

2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.

Maxims one and two announce the doctrine that all laws are territorial, that they have no force and effect *ex proprio vigore* beyond the limits of the enacting state, but bind all found within the territory. In thus proclaiming in such unqualified terms the territoriality of all laws Huber went beyond any of his predecessors. The writers belonging to the Italian school⁴ wrote at a time when feudalism was losing its foothold in the respective countries in which they wrote, and the modern doctrine of territorial sovereignty had not yet developed. The questions did not relate to the conflicting laws of independent states. In Italy they arose between the various local city laws and the Roman law which governed throughout the peninsula as a general common law. In France they arose between the different provincial "customs" of one and the same state. To limit the operation of laws to the confines of the state or province in which they had originated appeared, under such conditions, to be both unnatural and unnecessary. Following the tradition of the old Germanic law, some laws were deemed to follow the person wherever he went; whereas others were regarded as having merely a local effect. Neither the Italian writers, nor the French writers belonging to the Italian school, attempted, however, to define with precision which of the statutes would have extra-territorial effect and which would not.⁵

In Brittany, feudalism had maintained itself more strongly than in any other of the French provinces. Inspired by these feudal ideas, d'Argentré contended that "all customs are real," that is, territorial. In one respect, however, this courageous Britton yielded to the traditional view. The rule that the status and capacity of a person has extra-territorial effect had become

4. "The Italian doctrine consisted at first in the sketches, gradually gaining in clearness and certainty, of Durant, Belleperche, Cinus, and Fabre. It was thereupon enlarged, developed and complicated through the writings of Bartolus, and later enriched through additions from Baldus and Salicet. During the entire fifteenth century and a part of the sixteenth, in the hands of Paul de Castre, Alexander, Rochus Curtius in Italy, and Masuer, Chasseneuz, and Tiraqueau in France, it remained stationary. Dumoulin, at last, gave to it new life and a new impetus when d'Argentré arrested the movement and replaced it with a new theory": *Lainé*, "Introduction au Droit international privé," I, 250-51.

5. *Lainé*, "Introduction au droit international privé," I, 248 et seq.

so thoroughly established in France through the influence of the Italian school, that d'Argentré accepted the same as an exception to his general theory; but he attempted to confine it within narrow limits.⁶

The new doctrine formulated by d'Argentré did not fall upon a receptive ground in France, and for a century and more it was not accepted there. Feudalism was disappearing and there was no inclination to emphasize the differences in the laws of the various provinces.

In Holland conditions were different. The Dutch provinces had just gained their independence and formed a federation. But this federation affected but little the independence of the individual provinces in which there existed an intense jealousy of their local rights. This condition coupled with the fact that a growing commerce with foreign nations caused them to look upon the Conflict of Laws as arising between separate political sovereignties, led them to accept most readily d'Argentré's doctrine of the territoriality of all customs. A new school of jurists arose, represented by Paul Voet, Huber, and John Voet, which carried d'Argentré's doctrine to its logical conclusion. It declined to recognize any exception to the rule that laws have ipso jure no extra-territorial operation. According to these writers all extra-territorial effect of laws rested solely upon comity. Paul Voet was the first to lay down his new doctrine, without developing it. He did not even present it as something new, and supported his statement that all laws are territorial by reference to the older writers.⁷ His son, John Voet, on the contrary, was fully aware of the fact that the views set forth involved a radical departure from those expressed by d'Argentré, whose views he vigorously assailed.⁸ Twenty years before the publication of John Voet's great work on the Pandects, in which the latter's treatment of the Conflict of Laws is found, Huber had announced the doctrine of the Dutch school in the clearest and most unmistakable language, and had made it the foundation of his treatise on the subject under discussion.

Comity. Huber's third maxim indicates that the "sovereign" of a state may "by way of comity" recognize rights acquired under the laws of another state. Huber was the first writer who made it clear beyond a doubt, that the recognition in each state of so-called foreign created rights was a mere concession which such state made on grounds of convenience and utility, and not as the result of a binding obligation or duty. From the wording

6. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 2, 3, 9, 11. See discussion of status and capacity, *infra*.

7. *P. Voet*, "De Statutis," s. 4, c. 2, n. 7.

8. *J. Voet*, "Ad Pandectas," bk. 1, tit. 4, pt. 2, n. 5, 7.

of the maxim it would appear that Huber conceived of comity as a *political* concession which might be granted or withheld arbitrarily by the sovereign. He adds, however, that the solution of the problem is to be derived "not exclusively from the civil law but from convenience and the tacit consent of nations."⁹ What convenience and the tacit consent of nations might prescribe was evidently a question for the courts, and so the term "comity" came soon to be understood as *judicial* comity.¹⁰

Public Policy. In his third maxim the limits beyond which the recognition of foreign laws cannot go are also stated. In Huber's words they can be recognized only "so far as they do not cause prejudice to the power or rights of such government or of their subjects."¹¹ In other places he adds that such recognition will be denied if it would be revolting to accord it,¹² or if there has been an evasion of the local law.¹³

Application of Huber's Maxims

Status and Capacity in General. With reference to status and capacity the greatest difference of opinion has existed among the different writers. Those belonging to the Italian school applied the law of the domicile. They gave to such law extra-territorial operation, but they did not do so uniformly nor in accordance with fixed principles.¹⁴ D'Argentré regarded these matters as belonging to the personal statute which he admitted, by way of exception to his general doctrine, to have extra-territorial effect *ex proprio vigore*. In order to restrict the scope of this exception he held, however, that a statute was personal only if (1) it affected the person in a general and not merely in some special manner, and (2) it did not affect immovable property directly or indirectly.¹⁵ According to Paul Voet laws relating to status or capacity were not operative *ipso jure* in another state.¹⁶ He recognizes that on grounds of comity extra-territorial effect might be given to the personal statute, but he mentions only the case of a prodigal placed

9. Huber, "Praelect.," pt. 2, bk. 1, tit. 3, n. 2.

10. Catellani, "Il diritto internazionale privato e i suoi recenti progressi," II, 455-56.

11. See also Huber, "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 11, 12.

12. Ibid., n. 8 (in case of incestuous marriages).

13. Ibid., n. 8, 13.

14. Lainé, "Introduction au droit international privé," I, 259-62; Catellani, "Il diritto internazionale privato," I, 332-340.

15. D'Argentré, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 7, 8.

16. P. Voet, "De statutis," s. 4, c. 2, n. 6, 7.

under guardianship, and holds that the incapacity thereby imposed would be recognized even with respect to immovable property in another state.¹⁷ John Voet set forth the theory of the Dutch school more fully than any other writer, and forcefully argued in favor of the proposition that the laws governing status and capacity, like any other laws, could have by reason of their own inherent force no extra-territorial operation.¹⁸ To what extent exceptions might be recognized on grounds of comity is discussed by him in connection with the different topics. He felt unable to lay down any general rules in this regard.¹⁹

Huber is generally very lucid in his statements, but in the matter of status and capacity it is difficult to get his exact meaning. He says that from the general maxims stated the following maxim may also be derived:²⁰

“Personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect, that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place.”

The illustrations given in the same section would seem to indicate that a person who has become of age according to the *lex domicilii* will have capacity everywhere to bind himself and even to transfer immovable property situated elsewhere, and that a person placed under guardianship by the law of his domicile will not be bound by contracts entered into in another state. From the two sections that follow it is clear, however, that such is not Huber's meaning. He there distinguishes between status and capacity and subjects the latter to the *lex loci actus*.²¹

Capacity to Dispose of Immovable Property. The writers belonging to the Italian school applied the *lex domicilii*.²² Those following d'Argentré disagreed with respect to the question whether a statute affecting capacity to dispose of immovable

17. *P. Voet*, “De statutis,” s. 4, c. 3, n. 17.

18. *J. Voet*, “Ad pandectas,” bk. 1, tit. 4, pt. 2, n. 5 et seq.

19. *J. Voet*, *Ibid.*, n. 16.

20. *Huber*, “Praelect.,” pt. 2, bk. 1, tit. 3, n. 12.

21. Lainé assumes that Huber in giving the illustrations mentioned in paragraph 12 must have had in mind some conditions which he does not express. Such conditions may have been, according to Lainé, that the judges called upon to apply the foreign law had authority to confirm the “*venia aetatis*” or the interdiction, or to declare the party of age in accordance with local law: *Lainé*, “Introduction au droit international privé,” II, 185.

22. *Catellani*, “Il diritto internazionale privato,” I, 485-86.

property should be regarded as a real statute. D'Argentré himself was of this opinion;²³ but some of the later writers, giving a more restricted meaning to the term "real statute," held that the laws governing capacity to convey immovable property inter vivos, or by will, belonged to the class of personal statutes and were subject, therefore, to the *lex domicilii*.²⁴ Others made various distinctions.²⁵ All would admit that if the law of the situs prohibited a transfer of the property such prohibition was binding everywhere.

Of the writers belonging to the Dutch school Paul²⁶ and John²⁷ Voet held that the law of the situs would determine the capacity of a person to dispose of immovable property. Huber does not express himself clearly on the point. He states that the *lex loci actus* "does not apply to immovables when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated; such qualities remain unaffected in such state irrespective of what the laws of other states or the agreements of individuals may provide to the contrary."²⁸ From his subsequent observations it is doubtful whether in Huber's opinion the majority of a party to convey immovable property, or his general capacity to dispose of such property, should be governed by the *lex rei sitae*, or whether on grounds of comity the *lex loci actus* or the *lex domicilii* should control. The statement quoted may refer only to special mandatory provisions of the law of the situs.²⁹

Capacity to Make a Will Disposing of Movable Property. The

23. D'Argentré, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 7, 8.

24. Hert, "Opera," I, "de collisione legum," s. 4, n. 8.

25. Rodenburg and Boullenois accepted the doctrine that the *lex domicilii* governed with respect to transfers inter vivos. (Rodenburg, "Tractatus de jure conjugum," tit. 2, c. 1; Boullenois, "Traité de la personnalité et de la réalité des loix," ed. 1766, I, 77 et seq.; 127 et seq.; 705 et seq.; "Dissertations sur des questions qui naissent de la contrariété des loix et des coutumes," ed. 1732, 2-4.) As regards wills Rodenburg applied the *lex rei sitae* ("Tractatus, de jure conjugum," tit. 2, c. 5, n. 7). Boullenois distinguished whether the capacity to make a will affected the person or immovables. In the former case the *lex domicilii* would govern; in the latter case, the law of the situs (Boullenois, "Traité de la personnalité," I, 718, ed. 1766).

26. P. Voet, "De statutis," s. 9, c. 1, n. 4; s. 4, c. 2, n. 6; s. 4, c. 3, n. 12.

27. J. Voet, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 8.

28. Huber, "Praelect," pt. 2, bk. 1, tit. 3, n. 15.

29. The view that the *lex rei sitae* should determine the capacity to transfer immovable property inter vivos and by will became also the prevailing view in Germany in the sixteenth and seventeenth centuries: Wächter, "Archiv für die civilistische Praxis," XXIV, 275.

capacity of a testator to dispose of movable property by will has been determined invariably by the *lex domicilii* of the testator at the time of his death.³⁰ Huber does not express himself on the subject.

Form. Under the influence of Bartolus, the jurists of the Italian school came, on grounds of practical convenience, to recognize the rule that a legal act executed in the form prescribed by the law of the place of execution should be regarded as valid everywhere. At first this rule was an optional one, it being permissible to comply as regards formal execution with the law governing the validity of the transaction in general. Whether in the opinion of these writers the rule *locus regit actum*, as it was subsequently called, assumed in the course of time a mandatory character is uncertain.³¹ D'Argentré's doctrine of the territorial character of all law should have caused him logically to apply the *lex rei sitae* to the transfer of immovable property. But he passed the question over in silence, and his successors retained the traditional rule and applied it especially with respect to wills.³² The rule *locus regit actum* was at first optional in France, but it became obligatory in the end.³³ An express prohibition of the law of the situs would, of course, prevail.³⁴ The Belgian jurists were the first to accept the logical conclusion to which d'Argentré's doctrine led, and under their influence the Edict of Albert and Isabella, of 1611, was enacted, Art. 13 of which prescribed that the formalities of wills relating to land should be governed by the law of the situs.³⁵ The inconvenience of this rule began, however, to be

30. *J. Voet*, "Ad pandectas," bk. 28, tit. 3, n. 12.

31. *Lainé*, "Introduction au droit international privé," II, 399-400.

32. *Lainé*, "Introduction au droit international privé," II, 359; *Bouhier*, "Observations sur la coutume du duché de Bourgogne": "Oeuvres," I, 766, c. 28, n. 10, ed. 1787; *Froland*, "Mémoire concernant la nature et la qualité des statuts," I, 136, ed. 1729.

According to Boullenois, if the formalities prescribed relate to proof and authenticity the *lex loci actus* applies, but if they are attached to things the law of the situs governs: *Boullenois*, I, obs. 21, p. 426; obs. 23, p. 456; *Boullenois*, II, obs. 46, rule 4, p. 467, ed. 1766.

33. *Lainé*, "Introduction au droit international privé," II, 400-405.

34. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," c. 28, n. 10; "Oeuvres," I, 766, ed. 1787.

35. Art. 13 of the Edict reads as follows: "Si es lieux de résidence des Testateurs, et de la situation de leurs Biens, y a diversité de Coutumes pour le regard de ces dispositions de dernière volonté; Nous ordonnons qu'en tant que touche la qualité desdits Biens, si on en peut disposer, en quel âge, et avec quelle forme et solennité, on suivra les Coutumes et usances de la dite situation." Nouveau commentaire sur l'Édit Perpetuel, du 12 juillet, 1611 (Lille, 1770), p. 79.

Burgundus and Christinaeus approved this view: *Burgundus*, "Tractatus controversiarum ad consuetudines Flandriae," tract. 6, n. 2, 3; *Christinaeus*, "Practicarum quaestionum decisiones," IV, dec. 5, n. 5.

felt very soon. Juristic opinion reverted in favor of the *lex loci actus* and found expression in an official interpretation, as it was called, of the Edict by the Privy Council of the Belgian Provinces, rendered in 1634, which amounted in fact to a repeal of the above provision. It held that a will relating to foreign immovables might be validly executed in Belgium in the form prescribed by Belgian law.³⁶

The writers of the Dutch school entertained different views on the subject. Paul Voet recognized the rule *locus regit actum*, even as regards transactions affecting immovable property. A will disposing of such property was void, according to him, if it did not satisfy, as regards form, the *lex loci actus*.³⁷ He allowed, however, certain exceptions to the mandatory character of the rule, the principal one of which was that a contract or a will which was not executed in the form prescribed by the law of the place of execution should be sustained at the domicile of such party if it complied with the formal requirements of the *lex domicilii*.³⁸ Huber applied his second maxim, that all parties are to be deemed subjects of the place where they happen to be, to matters of form and concluded therefrom that the *lex loci actus* was binding absolutely. He recognized no exception and held the rule applicable to movable and immovable property alike.³⁹ According to him a will by a Dutch subject disposing of property in Holland, executed in Frisia in the form prescribed by the Dutch law, was therefore invalid.⁴⁰ John Voet, on the other hand, would sustain a will disposing of movable property if it conformed, as regards formal execution, either to the *lex loci actus* or to the *lex domicilii* and a will disposing of immovable property if it satisfied the *lex loci actus* or the *lex rei sitae*.⁴¹

36. *Lainé*, "Introduction au droit international privé," II, 362.

37. *P. Voet*, "De statutis," s. 9, c. 2, n. 1, 3.

38. *Ibid.*, n. 9, exc. 4. A will executed in the forms prescribed by the *lex loci actus* would not be sustained at the domicile, however, if the testator had gone to such place for the purpose of evading the *lex domicilii*. *Ibid.*, n. 4.

39. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 4, 8.

"Si lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitae. . . . licet enim hic subjectus revera maneat patriae suae, tamen illud, ut supra diximus, de actu primo est intelligendum, quoad actum vero secundum subditus illius loci sit temporarius, ubi agit vel contrahit, simulque ut forum ibi sortitur, ita statutis ligatur": *Hert*, "Opera," I, "de collisione legum," s. 4, n. 10, p. 179, ed. 1716.

40. *Huber*, *Ibid.*, n. 4.

41. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 15.

The rule that a legal act was valid, as regards formal requirements, if it satisfied the law of the place of execution, was established also in Germany in the course of the sixteenth century: *Wächter*, *Archiv für die civilistische Praxis*, XXIV, 276.

Immovable Property. The question to what extent the capacity of a person to convey immovable property and the formal requirements of instruments disposing of such property are controlled by the law of the situs has been discussed already. As regards substantive validity it should be noted that, ever since d'Argentré, laws affecting immovables as such formed the principal class of real statutes and were governed by the *lex rei sitae*.⁴² Great differences of opinion existed, however, in the application of the rule.⁴³ All agreed that an express prohibition imposed by the law of the situs should be respected everywhere.⁴⁴ Huber applies to immovables the law of the situs "when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated."⁴⁵

Movable Property. From the earliest time in the Conflict of Laws movables were deemed subject to the law of the domicile of their owner, a rule which was expressed by the Latin maxims "*mobilia ossibus inhaerent*" and "*mobilia personam sequuntur*." These maxims were employed as a rule with reference to questions of succession and to the property of married persons, that is, with reference to questions affecting a person's property as a whole. Scarcely an instance can be found where the rule was actually applied to the transfer of a particular article. The older writers stated the rule governing movables in general terms without distinguishing between the cases where a person's property as a whole was affected or the transfer related to a particular article.⁴⁶ Some followed d'Argentré's⁴⁷ view and held that movable property was attached to the person of the owner, being adherent to his person, as it were, and was governed, therefore, by the law governing his person.

42. There is little on the subject in the works of the writers belonging to the Italian school (*Lainé*, "Introduction au droit international privé," I, 258-59; *Catellani*, "Il diritto internazionale privato," I, 346-49). Bartolus inquires by what law the question whether a person has the right to raise a house higher is to be governed and he answers it by referring the question to the law of the situs: *Bartolus*, "In primam codicis partem commentaria," English translation by Professor Beale under the title of "Bartolus on the Conflict of Laws," n. 27.

43. *Lainé*, "Introduction au droit international privé," I, 328 et seq., 342 et seq., 395 et seq., 408 et seq., 413 et seq.

44. *Rodenburg*, "Tractatus de jure conjugum," tit. 2, c. 5, n. 1-6.

45. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

46. *Bar*, "Private International Law" (Guthrie's translation), 488-90.

47. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 30.

Others agreed with Dumoulin,⁴⁸ and regarded the question as falling within the real statute and subject, therefore, to the law of the situs, but by a legal fiction regarded such property to be at the domicile of the owner. Of the writers of the Dutch school Paul⁴⁹ and John⁵⁰ Voet accepted Dumoulin's view. Huber recognized the general rule in the distribution of movable property upon death but dismissed the subject by a mere reference to John à Sande.⁵¹ The latter accepted d'Argentré's explanation.⁵²

Contracts. The writers of the Italian school applied the law of the place where the contract was made to the determination of the natural consequences of a contract, that is, to the consequences which inhere in the contract from its inception, and the law of the place of performance, to the consequences which arise subsequently to the formation of the contract as the result of negligence or default. If no place of performance was specified the negligence or default was deemed to occur at the forum.⁵³ Dumoulin did not distinguish between the direct and indirect consequences of a contract but advanced the view that the intention of the parties should govern. If such intention was not expressed it was to be derived from the attendant circumstances.⁵⁴

The principle that the will of the parties, expressed or implied, was the controlling consideration was accepted also by the Dutch writers. In conformity with this view a contract might have extra-territorial operation and affect immovable property in another state.⁵⁵ Mandatory provisions of the situs would, of course, prevail.⁵⁶ Nor could effect be given to the ex-

48. *Dumoulin*, "Coutumes générales du haut et bas pays d'Auvergne," II, art. 41; "Opera," II, 747, col. 1, ed. 1681.

49. *P. Voet*, "De statutis," s. 4, c. 2, n. 2, 8; s. 9, c. 1, n. 8.

50. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 11.

51. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

52. *John à Sande*, "Opera juridica omnia," "Dec. Fris.," bk. 4, tit. 8, def. 7, p. 194, ed. 1697.

53. *Lainé*, "Introduction au droit international privé," I, 135-36; *Bartolus* (Beale's translation), n. 15, 16, 18. Bartolus applies the same rules to a contract to sell immovable property: *ibid.*, n. 16.

54. *Lainé*, "Introduction au droit international privé," I, 255-56.

"Aut statutum loquitur de his, quae meritum scilicet causae vel decisionem concernunt, et tunc aut in his, quae pendent a voluntate partium, vel per eas immutari possunt et tunc inspicuntur circumstantiae, voluntatis, quarum una est Statutum loci, in quo contrahitur; et domicilii contrahentium antiqui vel recentis, et similes circumstantiae": *Dumoulin*, "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus," "Opera," III, 554, ed. 1681.

55. *P. Voet*, "De statutis," s. 4, c. 2, n. 15. Cf. s. 9, c. 1, n. 2; *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 19.

56. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 20.

pressed or implied intention of the parties if it ran counter to prohibitory statutes of the forum or its laws establishing a public policy.⁵⁷ Huber appears to accept these views. He holds, however, relying on the Roman maxim "*contraxisse unusquisque in eo loco intellegitur, in quo ut solveret, se obligavit*" that where the place of performance differs from the law of the place where the contract was entered into, the parties will be deemed to have contracted with reference to the law of the place of performance.⁵⁸

Marriage. According to the early writers capacity to marry was governed by the general rule applicable to capacity. On grounds of policy and because of the influence of the church, whose co-operation was necessary in the celebration of a marriage, it seems, however, that the *lex loci celebrationis* had a greater influence than in connection with ordinary contracts.⁵⁹

As regards the ceremony required to constitute a valid marriage the rule *locus regit actum* was recognized.⁶⁰ Whether a marriage could validly be entered into by observing the formalities prescribed by the law of the domicile of the parties is not certain. The question cannot have arisen frequently in practice as even in Protestant countries it was the universal custom to celebrate a religious marriage, which in the nature of things conformed to the *lex loci celebrationis*.⁶¹ The jurists who explained the rule *locus regit actum* on the theory of a voluntary submission to the local law naturally assumed that the rule had a mandatory character.⁶² This was also no doubt Huber's view.⁶³

Various exceptions were laid down with reference to the application of the *lex loci celebrationis*. A marriage celebrated in accordance with the law of the place of celebration might not be recognized at the domicile of the parties if it was entered

57. *Ibid.*, n. 18. For illustrations see also *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 11.

58. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 10.

59. *Catellani*, "Il diritto internazionale privato," I, 478-79.

Boullenois expresses himself concerning the old French law as follows: ". . . le mariage étant du droit civil de chaque nation, par rapport aux formalités et aux conditions que la loi de chaque Pays exige, il est bon et valable dans tout autre, dès qu'il a été une fois valablement contracté dans un Pays": *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, c. 3, obs. 23, p. 495, ed. 1766.

60. *P. Voet*, "De statutis," s. 9, c. 2, n. 9; *J. Voet*, "Ad pandectas," bk. 23, tit. 2, n. 4.

61. *Friedberg*, "Das Recht der Eheschliessung in seiner geschichtlichen Entwicklung," 295-96. See also *Varnier*, "Droit français du mariage au point de vue du droit international privé," Paris, 1891, pp. 84 et seq.

62. *Hert*, "Opera," I: "de collisione legum," s. 4, n. 10.

63. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 8.

into in the face of a prohibitory statute there existing,⁶⁴ or in evasion of the law of the domicile,⁶⁵ or if it was deemed to conflict in other respects with the law of the forum. According to Huber such marriage will not be recognized if it prejudices others, if it is incestuous or if it was entered into in evasion of the law of the domicile.⁶⁶

Effect of Marriage Upon Property. In the absence of a marriage settlement the writers of the Italian school applied the personal law of the husband.⁶⁷ D'Argentré regarded the statutes relating to the effect of marriage upon the property of the spouses as real statutes, and held in consequence that the law of the domicile could not affect property situated in another province or country.⁶⁸ Dumoulin, on the contrary, maintained that the parties must be deemed to have submitted, by way of tacit agreement, to the *lex domicilii*.⁶⁹ Most of the later writers on the Conflict of Laws have accepted Dumoulin's theory of a tacit contract and the law of matrimonial domicile as the governing law.⁷⁰ Some writers, notably Boullenois, rejected the notion of a tacit contract, but desired that a single law should govern the property rights of spouses. They contended that the laws relating to the effect of marriage upon the property rights of husband and wife belonged to the status of marriage and were governed, therefore, by the personal law of the parties, that is, the law of their domicile.⁷¹ Writers rejecting the con-

64. J. Voet, "Ad pandectas," bk. 23, tit. 2, n. 4.

65. Ibid., bk. 1, tit. 4, pt. 2, n. 14; Boullenois, "Traité de la personnalité et de la réalité des loix," I, obs. 31, p. 427, ed. 1766; Bouhier, "Observations sur la coutume du duché de Bourgogne," I, c. 28, n. 60-62, "Oeuvres," I, 773-74, ed. 1787.

66. Huber, "Praellect," pt. 2, bk. 1, tit. 3, n. 8.

67. Bartolus on the "Conflict of Laws" (Beale's translation), n. 19.

68. D'Argentré, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 28-33.

69. Dumoulin, "Consilium," 53, n. 3, "Opera," II, 964, ed. 1681.

70. Bouhier, "Observations sur la coutume du duché de Bourgogne," I, c. 26, n. 3, "Oeuvres," I, 714, ed. 1787; 1 Hert, "Opera": "de collisione legum," s. 4, n. 44, 46, 47, 49. Pothier, "Traité de la communauté, principes préliminaires," n. 15. The latter states expressly that if the husband at the time of the marriage had the intention to acquire a new domicile he will be deemed to have submitted to the law of the new domicile.

The above became also the prevailing view in Germany towards the end of the seventeenth century. Wächter, Archiv für die civilistische Praxis, XXV, 48. Concerning the writers following d'Argentré's view, see Hert, "Opera," I, "de collisione legum," s. 4, n. 46.

71. "Je ne sais si, pour échapper à tous les cris de M. d'Argentré contre Me. Charles du Molin, il n'eût pas été plus court et plus convenable, sans recourir à la présomption d'une convention et d'une soumission, dont il ne paroît aucune trace, de regarder les statuts de la communauté et de la non-communauté, comme des Loix qui affectent les conjoints d'un état et d'une

tract theory and basing the application of the *lex domicilii* upon the direct operation of the law governing the status of the parties were logically forced to hold upon a change of domicile, that the law of the new domicile must determine the rights of the parties in future acquisitions of property, but it seems that this conclusion was not uniformly reached.⁷² All agreed that express prohibitions or other mandatory provisions of the law of the situs were binding everywhere.⁷³

The Dutch writers entertained conflicting views. Paul Voet states that the matter is governed by the law of matrimonial domicile, by which is meant the law of the actual domicile of the husband at the time of marriage, or, if he intended at that time to establish a new domicile, the law of the intended domicile.⁷⁴ He says also that a subsequent change in the domicile will not affect the applicatory law.⁷⁵ At the same time he holds that the laws concerning the effect of marriage upon the property of the spouses are real and have no operation with respect to foreign property.⁷⁶ Story's explanation of the various passages is that according to Voet all such contracts, whether express or tacit, are real and not personal laws, and therefore do not

condition pure personnelle": *Boullenois*, "Traité de la personnalité et de la réalité des lois," II, obs. 28, pp. 299-300, ed. 1766.

72. See *Boullenois*, "Traité de la personnalité et de la réalité des lois," II, obs. 38.

73. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 26, n. 3, 21, "Oeuvres," I, 714, 716, ed. 1787.

74. *P. Voet*, "De statutis," s. 9, c. 2, n. 5.

75. *Ibid.*, s. 9, c. 2, n. 7, where he says: "Quid si maritus alio domicilium postmodum transtulerit, eritne conveniendus, secundum loci statutum, in quem postremum sese recepit? Non equidem. Quia non eo ipso, quod domicilium transferat, censetur voluntatem circa pacta nuptialia mutasse. . . . Nisi eadem solemnitas in actu contrario intercesserit. . . . Accedit, quod illa pacta solus mutare nequeat maritus: id quod tamen posset, si per emigrationem in alium locum, ea mutarentur."

76. He says: "Verum quid statuendum de variarum Provinciarum in Belgio consuetudine, vel potius statuto, quo inter conjuges post celebratas nuptias, ut in Hollandia; post copulam, ut apud Ultrajectinos, bonorum inducitur communio, nisi pactis sit exclusa dotalibus, reali ne statuto adnumerabitur, an potius personali? Resp. Et si forte de jure civili tale statutum, ad exemplum societatis ad bona alibi jacentia sese extenderet, in qua societate, si ea sit omnium bonorum, etiam omnia continuo, perfectam aliquam traditionem, exceptis nominibus, communicabantur. . . .

"Etiam si pactum interveniat, ex eo nasceretur actio personalis, ad bonorum extra territorium jacentium, ubi contraria consuetudo locum habet communicationem, vel aestimationem. . . . Quia tamen illa communio statutaria potissimum rerum spectat alienationem, adeoque res ipsas afficit primario et principaliter, negari non poterit, quin reali statuto, hoc nostrum sit connumerandum; ut ad bona alibi sita, ubi contrarium obtinet statutum, reales effectus non exerat. . . .": *P. Voet*, "Ad statutis," s. 4, c. 3, n. 9.

directly affect property out of the territory, "but only indirectly, by a remedy to enforce the contract against extra-territorial property." ⁷⁷

John Voet, strong advocate as he was of the doctrine that all laws are territorial, and holding in that respect widely different views from Dumoulin, on grounds of expediency accepted the latter's theory of a tacit contract. Indeed, he contributed much in establishing the doctrine by showing in a most ingenious and forceful manner that the effect of marriage upon the property rights of the spouses results from the will of the parties. ⁷⁸

Huber rejected the theory of tacit contract, for he states expressly that upon a change of domicile the former law will not control the rights of the parties in property that is subsequently acquired. ⁷⁹ In other respects he accepts the view that the rights of the parties with reference to all property, immovable as well as movable, should be controlled by one law, the law of matrimonial domicile. ⁸⁰

Marriage Settlements. The validity of marriage settlements, so far as it depends upon capacity or form, is governed by the rules stated above. With respect to substantive validity the law of matrimonial domicile has been held generally to govern, subject to mandatory provisions of the law of the situs of immovables. ⁸¹

Intestate Succession. The writers of the Italian school did not work out any consistent theory on this subject. Influenced by the doctrine of universal succession of the Roman law some applied the law of the domicile of the decedent to all property. Many held, however, that the laws governing intestate succession were real. According to Bartolus a distinction must be made. If the statute of the situs of immovable property is real it would govern absolutely. If it was personal, it would not ap-

77. *Story*, "Conflict of Laws," 8th ed., 254, note 4.

78. *J. Voet*, "Ad pandectas," bk. 23, tit. 2, n. 85.

79. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 9.

80. *Ibid.*, n. 10.

81. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 10; *Catellani*, "Il diritto internazionale privato," I, 356, 481.

Bartolus had already contended that marriage settlements should be governed by the law of the husband's domicile. After stating that the *lex loci contractus* governs matters which arise out of the contract itself at the time it is made, he adds: (n. 17) "This doctrine does not apply in the case of dowry, for a reason stated in the text" (*Bartolus* on the "Conflict of Laws," Beale's translation, p. 19). The passage referred to is Digest, V, 1, 65, which reads as follows: "Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est; nec enim id genus contractus est, ut et eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cujus domicilium et ipsa mulier per condicionem matrimonii erat reditura."

ply to the estate of a foreigner.⁸² All were agreed that the law of the domicile of the decedent would determine the distribution of movables. In France and Germany laws of succession were regarded from the beginning as real.⁸³ D'Argentré proclaimed vigorously the same doctrine. As regards immovables the law of the situs therefore applied.⁸⁴ Movables, however, were considered as adhering to the person or as being situated at his domicile and were controlled, consequently, by the law of the decedent's domicile.⁸⁵ The above became the general doctrine in the seventeenth century in France, Belgium, Holland, and Germany.⁸⁶ The Dutch jurists Paul⁸⁷ and John⁸⁸ Voet and Huber⁸⁹ accepted this view. The doctrine that the succession to the whole estate of the decedent should be governed by one law arose only at a later date.⁹⁰

Wills. The rules governing capacity and form have been stated above. The substantive validity of wills relating to movables was governed by the domicile of the testator at the time of death.⁹¹ Wills relating to immovables were subject to the law of the situs.⁹² These views were shared also by the Dutch writers, including Huber.⁹³ The latter does not mention the rule governing the interpretation of wills. In this regard the

82. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 42; *Lainé*, "Introduction au droit international privé," II, 289-290.

83. *Lainé*, "Introduction au droit international privé," II, 284.

84. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 9, 10, 23, 24.

85. "Sed alia ratio est de personarum jure in quo et mobilia continentur, quia talia non alio jure habentur quam persona ipsa, et ideo legem ab domicili loco capiunt": *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 3.

86. *Lainé*, "Introduction au droit international privé," II, 294 et seq.

87. *P. Voet*, "De statutis," s. 4, c. 3, n. 10; s. 9, c. 1, n. 3, 8.

88. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 4, 2, n. 3, 11, 21; bk. 38, tit. 18, n. 34 (movables).

89. *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 15.

90. In Germany theory and practice broke away from the old law in the eighteenth century. The new doctrine supported the application of the law of the domicile of the decedent at the time of his death to immovable and movable property alike. The principal grounds upon which this doctrine was justified were: 1, that the estate represents the person of the deceased and should be governed therefore by his personal law; 2, that the law of inheritance is a succession in universum jus, which must be subject to one law:

See *Wächter*, *Archiv für die civilistische Praxis*, XXV, 195-98.

91. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 30; *J. Voet*, "Ad pandectas," bk. 28, tit. 3, n. 12.

92. *Dumoulin*, "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus," "Opera," III, 556, ed. 1681.

93. *P. Voet*, "De statutis," s. 9, c. 1, n. 4, 8; *J. Voet*, "Ad pandectas," bk. 28, tit. 1, n. 44; *Huber*, "Praellect.," pt. 2, bk. 1, tit. 3, n. 15.

writers generally referred to the domicile of the testator at the time of the execution of the will, even with respect to wills disposing of immovables.⁹⁴

Procedure. Since Bartolus, it has been recognized that matters relating to procedure were subject to the law of the forum.⁹⁵ Great differences of opinion have existed, however, with respect to the matters falling within the term "procedure." This has been true especially concerning the statute of limitations or prescription of actions. Bartolus regarded the question as going to the substance. In the matter of contracts he applied the law of the place of performance.⁹⁶ The later writers followed Bartolus in regarding the question of the prescription of actions as affecting the substantive rights of the parties instead of the remedy merely. In its application to contracts some applied the law of the place of contracting; others, the law of the place of performance.⁹⁷ Paul Voet broke with the traditional view on the subject by holding that the prescription of actions is a matter of remedy and subject to the law of the forum.⁹⁸ Huber took the same view.⁹⁹ Neither of these authors advanced any reasons for rejecting the old view. John Voet, who accepted the same doctrine, appears to justify it on the ground that the forum will be generally the domicile of the debtor.¹⁰⁰ The prescription of actions affecting immovables was held by all to be subject to the *lex rei sitae*.¹⁰¹

International Jurisdiction in Civil Matters. Following in the footsteps of the Roman law, the continental countries have never taken the view adopted by the Anglo-American courts that a personal action may be brought in any country in which the defendant may be served with process. They have required always that the defendant shall either be domiciled in the place where the action is brought, or own property there, or that the transaction shall have some connection with the law of that place.¹⁰² Where the jurisdiction was based upon the forum con-

94. *J. Voet*, "Ad pandectas," bk. 28, tit. 5, n. 16; *Hert*, "Opera," I: "de collisione legum," s. 6, n. 3, p. 222, ed. 1716.

95. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 15.

96. *Ibid.*, n. 19.

97. *Michel*, "La prescription libératoire en droit international privé," 29 et seq.

98. *P. Voet*, "De statutis," s. 10, n. 1.

99. *Huber*, "Praelect," pt. 2, bk. 1, tit. 3, n. 7.

100. *J. Voet*, "Ad pandectas," bk. 44, tit. 3, n. 12.

101. *Dumoulin*, "Opera," III, 557, ed. 1681; *J. Voet*, "Ad pandectas," bk. 44, tit. 3, n. 12; *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, obs. 20, p. 350, ed. 1766.

102. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., §§ 40-41; *Bar*, "Private International Law" (Guthrie's translation), 908 et seq.

The French doctrine that the courts have, on principle, no jurisdiction

tractus the Roman law required in addition that the defendant be served with process within the jurisdiction or that he possess property in such jurisdiction.¹⁰³ In modern times it has been contended, however, that inasmuch as the requirement of personal service in the above case resulted in Roman law from the fact that it knew nothing of citation by writing, this condition should be recognized no longer today when a citation by writing may be served upon the defendant in another state.¹⁰⁴ Even the writers belonging to the Dutch school, who extended the doctrine of the territoriality of all laws beyond the earlier writers, did not go so far as the Anglo-American courts, so as to base jurisdiction in personal actions upon service alone. In consonance with the principles of the Roman law,¹⁰⁵ which he followed, Huber held that all actions might be brought at the domicile of the defendant.¹⁰⁶ Actions in rem might be brought, according to Huber, also at the situs of the property,¹⁰⁷ and actions arising out of contracts, at the place where such contracts were to be fulfilled,¹⁰⁸ or, in exceptional cases, where they had been entered into.¹⁰⁹

in personal actions with respect to suits between foreigners is of modern origin. It did not exist in the old law: 8 Denisart, "Collection de décisions nouvelles, Étranger, § V, n. 1; 5 Weiss, "Traité de droit international privé," 2d ed., 55.

Concerning the old French law see in general, *Boulleñois*, "Traité de la personnalité et de la réalité des lois," obs. 25.

103. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., § 41, p. 509, citing Digest, V, 1, 19, § 1, pr.; XIII, 4, 1; *Bar*, "Private International Law" (Guthrie's translation), 921.

104. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., § 41, p. 509.

105. "Juris ordinem converti postulas ut non actor rei forum, sed reus actoris sequatur; nam ubi domicilium res habet vel tempore contractus habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet": Code, III, 13, 2.

"Actor rei forum, sive in rem sive in personam sit actio, sequitur. Sed et in locis, in quibus res, propter quas contenditur, constitutae sunt, iubemus in rem actionem adversus possidentem moveri": Code, III, 19, 3.

"Venire bona ibi oportet, ubi quisque defendi debet, id est, ubi domicilium habet, aut ubi quisque contraxerit. Contractum autem non utique eo loco intellegitur, quo negotium gestum sit, sed quo solvenda est pecunia": Digest, XXXXII, 5, 1-3. Cf. Digest, V, 1, 19, and discussion of subject by *Bar*, "Private International Law" (Guthrie's translation), 917-19, note 64.

106. *Huber*, "Praellect.," pt. 2, bk. 5, tit. 1, n. 49.

107. *Ibid.*, n. 48. Huber applied this doctrine both to movables and immovables. John Voet, on the other hand, held that as regards actions in rem affecting immovables the jurisdiction of the situs was exclusive: *J. Voet*, "Ad pandectas," bk. 5, tit. 1, n. 77.

108. *Huber*, "Praellect.," pt. 2, bk. 5, tit. 1, n. 53, 54.

109. *Ibid.*, n. 55. In accordance with the provisions of the Roman law Huber required with respect to contracts the additional condition that the

Foreign Judgments. The subject of *res judicata* and the enforcement of foreign judgments has become greatly complicated in modern times in consequence of the development of territorial sovereignty. During the Middle Ages, when the Roman law was regarded on the continent as the *jus commune* of all civilized countries, the recognition and enforcement of foreign judgments rendered by courts of competent jurisdiction appeared a natural duty imposed by considerations of justice. The jurists applied to this subject the same rules which were deemed controlling in the determination of the question whether a law had only territorial or also extra-territorial operation. Foreign judgments in *personam* were generally given effect everywhere in accordance with the Roman maxim "*res judicata pro veritate accipitur.*"¹¹⁰ Baldus,¹¹¹ D'Argentré,¹¹² John Voet,¹¹³ and Hertius¹¹⁴ held this view, which Huber¹¹⁵ likewise followed. According to the Dutch writers such recognition and enforcement rested, however, upon comity and would be declined when the interests of the forum or of its subjects would be impaired thereby.¹¹⁶ The courts of the *situs* were regarded as having exclusive jurisdiction with respect to actions in *rem* affecting immovables.¹¹⁷ Such judgments were not recognized or enforced, therefore, unless rendered by a court of the *situs*.¹¹⁸

Some of the French writers took views differing from the above.¹¹⁹

Criminal Law. The doctrine that criminal laws are exclusively territorial is a modern doctrine and was not established as yet when Huber wrote. Bartolus and Baldus had developed a considerable number of rules concerning the law of crimes in its international aspects. One of these was that if a citizen was prosecuted for a crime which he had committed abroad his guilt

defendant be served within the jurisdiction or own property therein: n. 54.

110. Digest, I, 5, 25.

111. Baldus, "In primum, secundum et tertium codicis librum commentaria," bk. 1, tit. "de sum. Trinitate," n. 93.

112. D'Argentré, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 47.

113. J. Voet, "Ad pandectas," bk. 42, tit. 1, n. 41.

114. Hert, "Opera," I: "de collisione legum," s. 4, n. 73.

115. Huber, "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 6.

116. P. Voet, "De statutis," s. 4, n. 14; Huber, "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 6.

117. Hert, "Opera," I, "de collisione legum," s. 4, n. 73.

118. J. Voet, "Ad pandectas," bk. 42, tit. 1, n. 41.

119. See Boullenois, "Traité de la personnalité et de la réalité des loix," I, obs. 25.

and punishment should be determined in accordance with the *lex loci delicti*.¹²⁰ The leading French writers on the subject of the Conflict of Laws during the sixteenth century, D'Argentré and Dumoulin, paid little attention to the subject. In the seventeenth century and at the beginning of the eighteenth the French practice went very far in the application of the law of the forum to crimes committed abroad.¹²¹ The Dutch jurists entertained various views. Burgundus held that, in the absence of an express statutory provision to that effect, the criminal laws of the forum would not apply to crimes committed by subjects abroad.¹²² He was also of the opinion that if the state into which a criminal had fled was asked to prosecute him, as might happen under exceptional circumstances in view of the fact that extradition was not granted, it could do so only in accordance with the *lex loci delicti*.¹²³ Confiscations of property pronounced in criminal courts were deemed to have no application to property in other states.¹²⁴ Paul Voet maintained that a criminal might be prosecuted according to the law of the forum with respect to crimes committed in another state.¹²⁵ Foreign sentences confiscating property were held by him to be effective everywhere as regards movables but not as regards immovables.¹²⁶ Huber likewise holds that the state in which a criminal is apprehended may prosecute him for a crime committed abroad, for whoever is found within a territory is, according to him, subject to its criminal jurisdiction.¹²⁷ He appears, however, to have reference solely to the question of jurisdiction and would recognize no doubt the application of the *lex loci delicti* to all substantive matters. With respect to the recognition and enforcement of foreign judgments Huber would make no distinction between judgments in civil and criminal matters. Both should be enforced, on grounds of comity, for reasons of utility and convenience, unless it would cause prejudice to the state or to its citizens.¹²⁸

120. See *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 44-49; *Meili*, "Lehrbuch des internationalen Strafrechts und Strafprozessrechts," 37-45.

121. *Meili*, "Lehrbuch des internationalen Strafrechts und Strafprozessrechts," 49.

122. *Burgundus*, "Tractatus controversiarum ad consuetudines Flandriae," tract. 5, n. 5, 6.

123. *Ibid.*, n. 9, 10. "In delictis rationem loci habemus in quo sunt commissae": *Ibid.*, n. 2.

124. *Ibid.*, tract. 3, n. 13.

125. *P. Voet*, "De statutis," s. 11, c. 1, n. 5.

126. *Ibid.*, s. 11, c. 2, n. 3, 4.

127. *Huber*, "De jure civitatis," bk. 3, s. 4, c. 1, n. 41-42.

128. *Ibid.*, n. 42.

II

From the foregoing presentation it may be readily inferred why the English courts, when toward the end of the eighteenth century the first cases involving a conflict of laws presented themselves for decision, should have accepted the doctrine of the Dutch school in preference to the views entertained by the writers of the Italian and French schools. According to Meili,¹²⁹ the reception of the doctrine of the Dutch school in England was materially assisted by the fact that William III was at the same time king of England and stadtholder of Holland and that the English and especially the Scotch students of the law were in the habit of completing their legal education in Holland. The real reason for such reception lay, however, much deeper. Had the English lawyers and judges been equally familiar with the writings of the Italian, French, and German writers they would unquestionably have accepted the theory advanced by the Voets and Huber, for these writers were the first to announce in the most unqualified manner the doctrine that all laws are territorial in their nature and can operate within the domain of another state only so far as the latter, on grounds of comity, consents to such operation. This viewpoint alone was acceptable to the Common Law of England which, owing to the strong influence of feudalism, possessed a most pronounced territorial character. This explains also why, of the Dutch writers, Huber's treatise should have been cited and relied upon most. Paul Voet, it is true, had expressed before the fundamental views advanced by Huber, and from a theoretical viewpoint the doctrines of the Dutch school were developed most by John Voet, whom Lainé¹³⁰ calls on that account the real founder of the Dutch school. John Voet was no doubt the greatest of the three. Indeed, so great was his influence upon the Dutch law that he is said to occupy a position similar to that which Pothier occupies with respect to French law. Although Huber did not originate the doctrines of the Dutch school, nor develop them, he stated the fundamental position of this school more lucidly and concisely than did either of the other two writers. The three axioms mentioned by Huber at the very outset of his treatise and which are the corner-stones of his entire discussion, express the viewpoint of the Dutch school in the boldest and most categorical manner. Story gives to these maxims his unqualified assent.¹³¹

129. Meili, "International civil and commercial law" (Kuhn's translation), 83-84.

130. Lainé, "Introduction au droit international privé," II, 388.

131. Story, "Conflict of Laws," 8th ed., 31.

The practical tone of Huber's treatise, which is illustrated by cases which the writer recollected from his experience as judge of the Frisian court, its brevity and simplicity, appealed to the English and American judges. The author contents himself with a brief statement of the principal rules and their application, without dwelling upon the many controversial points which obscure the writings of other writers.

Huber rejects the classification of statutes into personal, real and mixed—a classification adopted by Paul and John Voet—and proposes to solve all problems upon the basis of the axioms mentioned. The above division seems nevertheless to underlie his discussion of the subject. Although he states so nowhere expressly, and in some respects leaves the matter in doubt, he admits that all questions affecting immovable property directly, excepting matters of form, are subject to the *lex rei sitae*. He recognizes also, at least as regards status, that the personal statute will be given extra-territorial effect on grounds of comity.

Even if the correctness of the general maxims laid down by Huber is admitted as the fundamental basis upon which the Conflict of Laws must rest, much doubt may be experienced in their application to individual problems. Huber's own deductions are at times quite uncertain and in other instances quite arbitrary. For example, if the principle of temporary subjection, which Huber adopts as his second maxim, is sound, it should logically apply to all questions of capacity, and yet Huber's statements with respect to this important matter are obscure and it is very questionable to what extent they harmonize with the above axiom. If a person is subject to the law of the place in which he acts, whence does Huber derive the rule that the intention of the parties controls the obligation of contracts? If matters affecting immovables directly are to be excepted from the operation of the *lex loci actus* and to be submitted to the *lex rei sitae*—a proposition which is nowhere clearly stated by Huber—why should not the formal execution of instruments disposing of such property be subject logically to the law of the situs? And yet Huber applies the rule *locus regit actum*. How can the rule that the transfer of movables is governed by the *lex domicilii* be reconciled with the general maxims? Surely all the conclusions stated by Huber cannot be derived by mere logic from the maxims announced. It must not be forgotten, however, that Huber's object was to write a practical treatise which should state the existing law. Had he amplified his statements he would have admitted, without question, that some of the rules laid down by him could not be derived from his general

principles but had found general recognition on grounds of convenience.

The Belgian jurist, Albéric Rolin, speaking of Huber, says:¹³²

"His doctrine, however, is badly reasoned and little scientific. It is summed up in several axioms, stated quite arbitrarily, from which the author draws his deductions. We place above him immeasurably the jurist we have just mentioned, John Voet, whose influence upon the law of his country seems to us to have been more considerable."

We may contrast with this the following estimate from the pen of Professor Harrison. He says:¹³³

"But there is a special point in regard to which Ulrich Huber differs from the other civil jurists. All these writers, though they possess much good sense, learning, and practical wisdom, strove to distinguish between personal and real statutes. That was, as has been stated, an absolutely futile inquiry, which was devoid of all reality. If Ulrich Huber's treatise rests on the same basis, it furnishes nevertheless something in addition. Huber's treatise "*de conflictu legum*" is only a short essay, forming part of his introduction to the civil law, and is contained within five quarto pages. . . . They are characterized by clearness, practical judgment and an entire absence of pedantry. The rules laid down within those five pages are satisfactory and exact. The matter is not exhausted, it is true, and the maxims are very general. But, at the same time, they establish the bases of Private International Law and deal with the subject in conformity with our modern ideas.

"In the seventeenth century Private International Law was in the hands of the Dutch; in the following it belonged to the French. But the latter have added nothing to the general principles of the science. It must suffice to cite the names of D'Aguesseau, Bouhier, Froland, and Boullenois, who lived in the first half of the eighteenth century, in the great period which preceded the era of the French revolution. Their works contain ingenious remarks with respect to special cases; but none of these authors succeeded in adding a single scientific principle to Huber's three famous rules, and all accepted the old useless method which attempted to classify the statutes instead of analyzing the legal relations."

Concerning the influence of the Dutch school upon the development of the Conflict of Laws, Meili's words probably ex-

132. *Rolin*, "*Principes du droit international privé*," I, 79.

133. *Clunet*, *Journal du droit international privé*, VII, 428.

press the general verdict among the modern continental jurists.¹³⁴ He says:¹³⁵

"It has been said for a time that the Dutch writers opened the way for the development of Private International Law—les jurisconsultes des Pays-Bas ont frayés la route—as Foelix has asserted.¹³⁶ The Dutch school has in fact put the Conflict of Laws out of joint and has placed the whole subject on a basis where it nearly perished. At all events it blocked the way to its future development. Retrogression and not progress resulted from this school. Every day we still feel the reflex effect of this erroneous doctrine. The Dutch writers prepared a juridical blind alley for our subject in the form of *comitas*. This is the truth and all else is fiction."

"Comity," says another writer,¹³⁷

"is a pretext for the evasion of the consequences of a strict territorial law. After the notion of such law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, ideas so important for the history of law, play a part. . . . The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations."

The Anglo-American view is stated nowhere better than in the following words of Story:¹³⁸

"It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy as a matter of paramount moral duty. Now assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the

134. Some take a less radical view. See *Catellani*, "Il diritto internazionale privato," I, 454 et seq. One of the late French writers on the Conflict of Laws defends the theory of the Dutch writers: *Vareilles-Sommières*, "La synthèse du droit international privé," I, 8, 78-97.

135. *Meili*, in Niemeyer's *Zeitschrift für internationale Privat- und Strafrecht*, VIII, 190.

136. *Foelix*, "Traité du droit international privé," I, 4th ed., 15.

137. *Bustamante*, "Tratado de derecho internacional privado," I, 456.

138. *Story*, "Conflict of Laws," 8th ed., 32, 33, 35.

duty, but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretense to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust. . . .

"The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return. . . .

"There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided."

Such a difference in the appreciation of the Dutch school, and of Huber in particular, as appears from the quotations above given, must be due to a difference in the fundamental conception concerning the nature and legal basis of the subject of Private International Law. This is indeed the true explanation. The word "comity" on the continent stands opposed to "justice." It was in this sense that the Dutch writers probably used it. Huber does not say so in so many words but John Voet does. He says that foreign laws are admitted "*ex comitate liberaliter et officiose nullo alioquin ad id jure obstricto.*"¹³⁹ Although Huber was not the originator of the theory of comity he was nevertheless the first to give prominence to the idea through his maxims, and became thus in large measure responsible for its popularization. The notion of justice and comity are, however, not necessarily disassociated.

"Once the tacit existence of comity is admitted," says Catellani,¹⁴⁰ "it can be derived only from custom and the decisions of courts, and in the one case as well as in the other it becomes an effect and mani-

139. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 1.

140. *Catellani*, "Il diritto internazionale privato," I, 454-55.

festation of the popular conscience whose constant direction indicates to the judges what they ought to regard as the tacit will of the state. Comity in this sense, and so modified in its original meaning, becomes an element which may be rendered a more and more perfect vehicle for the development of Private International Law. In each age it will reflect the consciousness, rooted more and more firmly in the popular conscience, of what corresponds to the common advantage of all the states and all mankind. And when this conscience becomes later conscious also of the existing solidarity between the states and the international rights of individuals, both will find in the notion of comity the same sanction through the tacit will of the state."

It was in this juridical sense that the term comity came to be actually understood. Says Westlake:¹⁴¹

"While English writers and judges freely borrowed the term 'comity' from John Voet and Huber, it may be doubted whether they meant it strictly in a sense independent of justice. Although on the continent comity and justice are usually regarded as forming an antithesis, it is probable that in this country the prevailing view has been that while a concession is made in not determining every question by the *lex fori*, that concession is dictated not only by a convenience amounting to necessity, but also by deference to a science of law embodying justice, which the law of the land was deemed to have adopted as governing its own interpretation and application, and from which it was conceived that the rules of comity were drawn."

Huber was a positivist who stated fearlessly what he believed to be the actual law. He saw that the recognition and enforcement of foreign law depended upon the assent of the state called upon to recognize or enforce the alleged right. A foreign law could have no effect *ipso jure* outside the territory of the enacting state. It must be recognized or accepted, that is incorporated, by the law of the forum. This is Huber's doctrine in essence. This is also the standpoint of the Anglo-American law and of the continental courts. The foreign doctrinal writers are not satisfied, however, with this conception of the Conflict of Laws.¹⁴² Their aim is to plant the science of Private International Law upon a foundation more stable than that of comity. No uniformity can ever be attained, according to them, if each state is free to adopt those rules of the Conflict of Laws which appear to it most convenient and useful. They seek to derive the

141. *Westlake*, "Private International Law," 5th ed., 22-23.

142. See *Pillet*, "Principes de droit international privé," Paris and Grenoble, 1903; *Zitelmann*, "Internationales Privatrecht," Leipzig, Vol. 1 (2d ed.), 1912, Vol. 2 (1st ed.), 1903.

rules of the Conflict of Laws, therefore, from a source that shall be superior to the internal law of each state, and this source they conceive to be International Law. Instead of being a part of the internal law of each state, the rules of the Conflict of Laws constitute, in their opinion, a universal system which imposes its rules upon the individual states from without. According to this conception, the rules of the Conflict of Laws are in reality rules defining the jurisdiction of the different states, the limits of each being determined by International Law. As the positive International Law of today has developed very few principles relating to our subject,¹⁴³ each jurist must needs be guided in the formulation of the fundamental principles by his own sense of justice, and assume, as it were, the rôle of an international legislator.

The continental jurists recognize that in certain matters affecting its social and economic interests each state must be free to exclude the operation of foreign law within its territory. The rules governing in this regard are called rules of "public order." Concerning the meaning and application of these rules there is hopeless disagreement. If the conclusions reached in individual instances are similar to, or identical with, those obtained upon the basis of the doctrines of the Dutch school, the fundamental difference in the scientific viewpoint of the internationalists and the positivists must not be overlooked. The continental jurists are theorists who believe that the harmonious development of the science of Private International Law can be promoted best through the elaboration of an ideal legal system, without reference to the existing law. The Anglo-American lawyers and judges, on the other hand, are positivists, who understand by the term "law" rules which are recognized and enforced by courts of justice. They find it difficult to see how good can result from a discussion of principles which exist only in the mind of the particular writer.

That these discussions have not resulted in a *communis opinio doctorum*, which might have a beneficial effect upon the development of the Conflict of Laws, is known to all acquainted with the continental literature on the subject. It is difficult to find a subject with reference to which there is so much dis-

143. "Pillet believes in a compulsive force of universal law, exercised alike on Sovereigns and private individuals, or perhaps through Sovereigns on private individuals. Neither the comity theorists nor Dicey believe in it. I believe in it, but I think it is very easy to exaggerate its content. Phillimore's views are very much mine, and I respectfully refer to them ("International Law," IV, §§ 4, 5). In more recent days, those of Professor Kahn ("Natur und Methode des internationalen Privatrechts"), cited by Pillet, approach very nearly to the same thesis": *Baty*, "Polarized Law," 168.

agreement. Solid progress can be made only if the juristic discussions keep in touch with actual life and positive law. A uniform system of the Conflict of Laws that shall have force in the different countries will never exist as long as there are independent states. All that is humanly attainable is a greater uniformity than that now existing. Before much can be accomplished in this direction there must exist a better understanding of foreign legal systems, and a greater degree of trust and confidence in such systems. As long as each country feels at heart that its own law is the best in the world, and that justice can be secured only in accordance with its rules, there is little hope of any real progress. As the solidarity of nations comes more into evidence and the justice of enforcing foreign laws under given circumstances becomes more apparent, the different systems will gradually tend towards greater uniformity. During this process the fundamental conceptions concerning the Conflict of Laws entertained by Huber, though imperfectly developed by him, will constitute a secure foundation. Instead of having almost destroyed the science of Private International Law, as Meili has asserted, the Dutch jurists were the first to have any real conception of such a science. Huber's axioms must, in the nature of things, govern our subject until the complete sovereignty of the individual states is lost and a common superior has been established.

As long as there remains between the Anglo-American and continental writers such a wide difference in their conception of "law" and the science of law, there will naturally remain also the same wide difference of opinion in their estimation of Ulrich Huber and of the Dutch school in general.

APPENDIX

DE CONFLICTU LEGUM DIVERSARUM IN DIVER- SIS IMPERIIS ¹

1. *Origo et usus hujus Quaesiti,
forensis quidem, at juris
Gentium magis quam civilis.*
2. *Regulae fundamentales hujus
doctrinae.*

OF THE CONFLICT OF DI- VERSE LAWS IN DIVERSE GOVERNMENTS

1. Origin and use of this ques-
tion, forensic indeed, but
belonging to international
rather than to civil law.
2. The fundamental rules of the
subject.

1. The text follows the second edition of *Huber's* "Praelectionum Juris civilis tomi tres," Leipzig, 1707, a copy of which may be found in the library of the Harvard Law School. The splendid collection of works on the Conflict of Laws contained in this library has been placed generously at the disposal of the writer.

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| <p>3. <i>Acta inter vivos et mortis causa valent ubique secundum jus loci, quo celebrantur.</i></p> <p>4. <i>Quod exemplo declaratur, testamenti.</i></p> <p>5. <i>Contractus.</i></p> <p>6. <i>Rei Judicatae.</i></p> <p>7. <i>Actionis instituendae.</i></p> <p>8. <i>Matrimonii.</i></p> <p>9. <i>Extendi hoc etiam ad effectus earum rerum, etiam quod ad immobilia.</i></p> <p>10. <i>Limitatio regulae de loco.</i></p> <p>11. <i>Alia limitatio ejusque amplificatio.</i></p> <p>12. <i>Regula de qualitatibus personalibus certo loco impressis, ubique vim habentibus.</i></p> <p>13. <i>Scilicet, qualem ejusmodi personae jure cujusque loci habent: ut exemplis declaratur.</i></p> <p>14. <i>In jure immobilium spectari jus loci, quo sita sunt.</i></p> <p>15. <i>Declaratur exemplis Testamenti, Contractuum et Successionis ab intestato.</i></p> | <p>3. Acts inter vivos and mortis causa are valid everywhere according to the law of the place where they are done.</p> <p>4. Its application to wills.</p> <p>5. Its application to contracts.</p> <p>6. Its application to res judicata.</p> <p>7. Its application to the bringing of actions.</p> <p>8. Its application to marriage.</p> <p>9. The extension of the rule to the effect of the above transactions and even with respect to immovables.</p> <p>10. Limitation of the rule of the place.</p> <p>11. Another limitation and its amplification.</p> <p>12. The rule that personal qualities impressed by a certain place have force everywhere.</p> <p>13. It is manifest to what sort of limitation such persons are subject according to the law of each place, as will be shown by examples.</p> <p>14. As regards immovables the law of the situs must be consulted.</p> <p>15. This is shown by examples from the law of wills, contracts, and intestate succession.</p> |
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1. Saepe fit, ut negotia in uno loco contracta usum effectumque in diversi(s) locis imperii habeant, aut alibi dijudicanda sint. Notum est porro, leges et statuta singulorum populorum multis partibus discrepare, posteaquam dissipatis imperii Romani provinciis, divisus est orbis Christianus in populos ferme innumeros, sibi mutuo non subjectos, nec ejusdem ordinis imperandi parendique consortes. In jure Romano non est mirum nihil hac

1. It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surpris-

de re exstare, cum populi Rom. per omnes orbis partes diffusum et aequabili jure gubernatum Imperium, conflictui diversarum Legum non aequè potuerit esse subjectum. Regulae tamen fundamentales, secundum quas hujus rei judicium regi debet, ex ipso jure Rom. videntur esse petendae; quanquam ipsa quaestio magis ad jus Gentium quam ad jus Civile pertineat, quatenus quid diversi populi inter se servare debeant, ad juris Gentium rationes pertinere manifestum est. Nos ad detegendam hujus intricatissimae quaestionis subtilitatem, tria, collocabimus axiomata, quae concessa, sicut omnino concedenda videntur, viam nobis ad reliqua planam redditura videntur.

2. Sunt autem hae: I. *Leges cujusque imperii vim habent intra terminos ejusdem reip. omnesque ei subjectos obligant, nec ultra. per l. ult. ff. de Jurisdict.* II. *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur, per. l. 7, s 10. in fin. de interd. et releg.* III. *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praefudicetur.* Ex quo liquet, hanc rem non ex simplici jure Civili, sed ex commodis et tacito populorum consensu esse petendam: quia sicut leges alterius populi apud alium

ing that there is nothing in the Roman law on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws. The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations than to the civil law, it is manifest that what the different nations observe among themselves belongs to the law of nations. For the purpose of solving the subtlety of this most intricate question, we shall lay down three maxims which being conceded as they should be everywhere will smooth our way for the solution of the remaining questions.

2. They are these:

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond (Digest, 2, 1, 20).

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof (Digest, 48, 22, 7, § 10, i.f.).

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation

directe valere non possunt, ita commerciis et usu gentium promiscuo nihil foret magis incommodum, quam si res jure certi loci validae, mox alibi diversitate Juris infirmarentur, quae est ratio tertii axiomatis: quod, uti nec prius, nullum videtur habere dubium. De secundo videntur aliqui secus arbitrari, quando peregrinos legibus loci, in quibus agunt, teneri negant. Quod in quibusdam casibus esse verum fatemur et videbimus *infra*: sed hanc positionem, *pro subjectis imperio habendos omnes, qui infra fines ejusdem agunt*, certissimam esse, cum natura Reipubl. et mos subigendi imperio cunctos in civitate repositos, tum id, quod de arresto personali apud omnes fere gentes receptum est, arguit. Grotius 2. c. 11. n. 5. Qui in loco aliquo contrahit tanquam subditus temporarius legibus loci subjicitur. Nec enim ulla ratione freti sunt, qui peregrinos, sine alia causa, quam quod ibi reperiuntur, Arresto medio, illic juri sistere se cogunt, quam quod imperium in omnes, qui intra fines suos reperiuntur, sibi competere intelligunt.

3. Inde fluit haec Positio: *Cuncta negotia et acta tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata valent, etiam ubi diversa juris observatio viget, ac ubi sic*

can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained. As for the second maxim, some persons seem to be of a different opinion and to deny that foreigners are subject to the law of the place in which they act. I consider this to be true in certain cases, as we shall see below. But the proposition that all within the boundaries of a government are to be deemed subjects thereof is nevertheless perfectly correct, for it is in conformity not only with the nature of a state and the custom of subjecting all found therein to its sovereignty, but also with the doctrine accepted by almost all nations concerning personal arrest. Grotius, 2, c. 11, n. 5, says that he who contracts in any particular place subjects himself as a temporary subject to the laws of such place. For the doctrine that foreigners are compelled to submit to mesne arrest, for no other reason than that they are found in a place, can be justified only on the ground that the sovereignty is deemed to extend over all found within the territory.

3. From the above the following principle is derived; all transactions and acts, in court as well as out, whether mortis causa or inter vivos, rightly done according to the law of any particular place, are valid even where a different law prevails,

inita, quemadmodum facta sunt, non valerent. E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt; idque non modo respectu hominum, qui in loco contractus habent domicilium, sed et illorum, *qui ad tempus ibidem commorantur.* Sub hac tamen exceptione; si rectores alterius populi exinde notabili incommodo afficerentur, ut hi talibus actis atque negotiis usum effectumque dare non teneantur, secundum tertii axiomatis limitationem. Digna res est, quae exemplis declaretur.

4. In *Hollandia* testamentum fieri potest coram notario et duobus testibus, in *Frisia* non valet, nisi septem testibus confirmatum. Batavus fecit testamentum more loci in *Hollandia*, ex quo bona, quae sita sunt in *Frisia*, illic petuntur. Quaeritur, an iudices *Frisii* secundum illud testamentum vindicias dare debeant. Leges *Hollandiae* non possunt obligare *Frisios*, ideoque per axioma *primum* testamentum illud in *Frisia* non valeret, sed per axioma *tertium* valor ejus sustinetur et secundum illud jus dicitur. Sed *Frisius* proficiscitur in *Hollandiam*, ibique facit testamentum more loci contra jus *Frisicum*, redit in *Frisiam* ibique diem obit, valetne testamentum? valebit, per axioma *secundum*,

and where, had they been so done, they would not have been valid. On the other hand, transactions and acts done in violation of the law of that place, since they are invalid from the beginning, cannot be valid anywhere; and this is true not only as regards persons having their domicile in the place of the contract, but also as regards those who are there for the time being. With this exception, nevertheless, if the sovereigns of another nation should be affected thereby with a serious inconvenience they would not be bound to give force and effect to such acts and transactions, according to the restriction laid down in the third maxim. The matter is important enough to be illustrated by examples.

4. In *Holland* a will can be made before a notary and two witnesses. In *Frisia* it is not valid unless attested by seven witnesses. A Dutch subject made a will in *Holland*, in accordance with the custom of the place, by virtue of which property situated in *Frisia* is demanded in that place. The question is whether the judges of *Frisia* should allow him to vindicate the property in accordance with such will. The laws of *Holland* cannot bind the *Frisians*; therefore, according to the first maxim, such will would not be valid in *Frisia*, but by the third maxim its validity would be supported, and by that the will is sustained. But suppose that a *Frisian* goes to *Holland*, where he makes a will in conformity with the law of the place but contrary to *Frisian* law, and returns to *Frisia*, where he dies. Is the will valid? It is valid according to the second

quia dum fuit in Hollandia, licet ad tempus, jure loci tenebatur, actusque ab initio validus ubique valere debet, per axioma *tertium*, idque sine discrimine mobilium et immobilium bonorum, ut juris est ac observatur. Frisius e contra facit in patria testamentum coram Notario cum duobus testibus, profertur in Hollandia, ibique bona sita petuntur, non fiet adjudicatio, quia testamentum inde ab initio fuit nullum, utpote factum contra jus loci. Quin idem juris erit, si Batavus heic in Frisia tale testamentum condat, etsi in Hollandia factum valeret; verum enim est, quod heic ita factum ab initio fuerit nullum, per ea, quae *modo* dicta fuerunt.

5. Quod de testamentis habuimus, locum etiam habet in *actibus inter vivos*; proinde contractus celebrati secundum jus loci, in quo contrahuntur, ubique tam in jure quam extra judicium, etiam ubi hoc modo celebrati non valerent, sustinentur; idque non tantum de forma, sed etiam de materia contractus affirmandum est. *Ex. gr.* In certo loco merces quaedam prohibitae sunt; si vendantur ibi, contractus est nullus: verum si merx eadem alibi sit vendita, ubi non erat interdicta, et ex eo contractu agatur in locis, ubi interdictum viget, emptor condemnabitur; quia contractus

maxim, because while he was in Holland, although only temporarily, he was bound by the law of the place; and an act, valid from the beginning, should be valid everywhere, in accordance with the third maxim, without distinction between movable and immovable property, and such is the actual law. A Frisian, on the other hand, makes in his own country a will before a notary and two witnesses. It is carried into Holland, and a demand is made of the things found there. Recovery is denied because the will was invalid from the beginning, having been made contrary to the law of the place. And the same thing would be true if a Dutch subject should make such a will in Frisia, although it would have been valid if made in Holland; for a will made here in this manner would be void from the beginning for the reasons just stated.

5. What we have said about wills applies also to acts *inter vivos*. Contracts made in accordance with the law of the place where they are entered into will therefore be supported everywhere, in court as well as out, even in those places where contracts entered into in such manner would not be valid. And this may be affirmed not only with respect to the form of the contract but also as regards its substance. For example: In a certain place particular kinds of merchandise are forbidden to be sold. If they are sold in such a place the contract is void. But if the same merchandise were sold in some other place, where it is not prohibited, and suit is brought on the contract where the prohibition exists, the purchaser

inde ab initio validus fuit. Verum si merces venditae, in altero loco, ubi prohibitae sunt, essent tradendae, jam non fieret condemnatio; quia repugnaret hoc juri et commodo Reip. quae merces prohibuit, secundum limitationem axiomatis tertii. Ex adverso, si clam fuerint venditae merces, in loco, ubi prohibitae sunt, emptio venditio non valet ab initio nec parit actionem, quocunque loco instituatur, utique ad traditionem urgendam: nam si traditione facta, pretium solvere nolle emptor, non tam e contractu quam re obligaretur, quatenus cum alterius damno locupletior fieri vellet.

6. Similem usum habet haec observatio in *rebus judicatis*. Sententia in aliquo loco pronuntiata, vel delicti venia ab eo, qui jurisdictionem illam habet, data, ubique habet effectum, nec fas est alterius Reipub. magistratibus, Reum alibi absolutum veniave donatum, licet absque justa causa, persequi aut iterum permittere accusandum; Rursus sub hac exceptione; nisi ad aliam Rempubl. evidens inde periculum aut incommodum resultare queat; ut hoc exemplo constare potest nostrae memoriae. Titius in Frisiae finibus homine percusso in capite, qui sequenti nocte, sanguine multo e naribus emissio, at bene potus atque ce-

will be held because the contract was valid from the beginning. If the goods are to be delivered, however, in a place where they are prohibited, no recovery can be had because it would be repugnant to the law and interests of the state prohibiting the sale of such goods, according to the restriction contained in the third maxim. On the other hand, if the merchandise should be sold secretly, in the place where such sale is prohibited, the sale would not be valid from the beginning and no action will lie no matter where it may be brought, not even to compel the delivery; for if the purchaser should refuse to pay the price after delivery he would be bound not so much by virtue of the agreement as by the delivery of the thing, in so far as he would enrich himself at the expense of another.

6. The above rule applies equally to the subject of *res judicata*. A sentence pronounced in any place, or the pardon of a crime granted by one having jurisdiction, will have effect everywhere. Nor is it lawful for the magistrates of another state to prosecute, or suffer to be prosecuted a second time, one who has been acquitted or pardoned in another place, although without a sufficient reason; with this exception again, that no evident danger or prejudice will result therefrom to such other state, as may be seen from the following case within our memory. Titius struck a man on the head upon Frisian territory. The man having lost much blood through his nose, and having eaten and drunk heartily, died during the following night. Titius escaped into Transylvania. Being apprehended

natus, erat exstinctus; Titius, inquam, evasit in Transisulaniam. Ibi captus, ut videtur volens, mox judicatus et absolutus est, tanquam homine non ex vulnere exstincto. Haec sententia mittitur in Frisiam et petitur impunitas rei absoluti. Quanquam ratio absolutionis non erat a fide veri aliena, tamen Curia Frisiae vim sententiae veniamque reo polliceri, Transisulani licet postulantes, gravata est. Quia tali in viciniam effugio et processu affectato, jurisdictioni Frisiorum eludendae via nimis parata futura videbatur, quae est tertii axiomatis exceptionis ratio. Idem obtinet in sententiis rerum Civilium, quo pertinet sequens exemplum memoriae quoque nostrae. Civis *Harlinganus* contractum iniverat cum *Groningano*, seque submiserat iudicibus Groninganis. Vi submissionis hujus Groningam citatus, et cum non sisteret se, condemnatus fuerat, quasi per contumaciam. Petita executione dubitatum est, an concedenda foret, in curia Frisica. Dubitandi ratio, quod vi submissionis, si reus in territorio iudicis, cui se submitit, non reperiatur, nemo contumaciae peragi possit, ut *alibi* videbimus: neque *sine detrimento jurisdictionis nostrae et praejudicio civium nostratium talibus sententiis effectus dari queat*. Concessa tamen est eo tempore; qui-

there, voluntarily as it seems, he is tried at once and acquitted as if the man had not died from the wound. This sentence is sent to Frisia and freedom from punishment is asked on behalf of the person acquitted. Although the reason for the acquittal may not have been untrue, it was nevertheless a serious question with the court of Frisia whether it should give effect to the foreign sentence and excuse the delinquent, although requested by the Transylvanians; for such an escape into the neighboring country and pretended prosecution appear to prepare the way too much for an evasion of the Frisian law, which is the basis of the exception under the third maxim. The same is true of judgments respecting civil matters, as is seen from the following example which is also within our memory. A citizen of Harlem made a contract with a citizen of Groningen, in which he submitted himself to the judges of Groningen. Being cited to appear before the courts of Groningen, by virtue of this submission, and not appearing he is condemned as contumacious. Execution of the judgment being sought from a Frisian court, it was doubted whether it ought to be granted. The reason of doubting was that if the defendant was not found in the territory to whose judges he had submitted, he could not be proceeded against as contumacious, as we shall see elsewhere. Nor can effect be given to such judgments without detriment to our jurisdiction or prejudice to our citizens. It was granted, however, at that time, certain magistrates being of the opinion that the Frisians could not be al-

busdam Dominis ita consentibus; quod Frisiis non liceret arbitrari, quo jure sententia Groningae lata esset, modo secundum jus loci valeret. Alii hac ratione; quod Magistratus Harlinganus in urbe sua requisitus citationem permiserat, quod facere potius non debuisset. Alioque Amstelodamenses negavisse executionem sententiae latae in absentem, per Edictum vi submissionis citatum ad Curiam Frisicam, et nemine contradicente damnatum, memini factum et recte meo iudicio; propter limitationem axiomatis *tertii* commemoratam.

7. Praeterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda aliud juris apud nos, aliud esset, ubi contractus erat initus, utrius loci jus servandum foret. Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit Praescriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi praescriptionem non esse receptam; Proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa *Justi Blenkenfieldt* contra G. Y., iterum inter *Johannem Jonoliin*, Sartorem Principis Aurausionensis contra N. B., *utraque ante*

lowed to inquire by what principle the judgment of Groningen had been pronounced, but only whether it was valid according to the law of the place. Others advance the reason that the magistrate at Harlem on request had granted a citation in his city, which he ought rather not to have done. Moreover, I recollect the fact that the magistrates in Amsterdam deny the execution of judgments by default, the defendant having been cited before a Frisian court by an order based upon submission and having been condemned without being heard, and in my opinion correctly, on account of the restriction contained in the third maxim.

7. Again, the question has been raised whether if suit is brought here upon a contract made elsewhere, and our law with respect to the allowing or denying the action differs from that of the place where the contract was made, which law ought to govern? For example, a Frisian who becomes indebted in Holland, on account of merchandise sold there at retail, is sued in Frisia after the expiration of two years. He pleads our statute of limitations which is applicable to this class of debts. The creditor replies that such limitation does not exist in Holland, where the contract was made, and that it cannot be pleaded therefore in this action. But it was otherwise decided—once in the case of *Justus Blenkenfieldt v. G. Y.* and again in an action between *John Jonoliin*, tailor of the Prince of Orange, v. N. B.—both before the great fair in 1680. For the same reason, if someone should sue a debtor in Frisia on an in-

magnas ferias 1680. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causae cognitione et sententia. Ratio haec est, quod praescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendae, quae per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet. Sandius *lib. 1, tit. 12, def. 5*, ubi tradit, etiam in executione sententiae alibi latae, servari jus, in quo fit executio, non ubi res judicata est.

8. *Matrimonium* pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, praejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alibi esse permissum; quod vix est ut usu venire possit. In Frisia matrimonium est, quando mas et foemina in nuptias consenserunt et se mutuo pro conjugibus habent, etsi in Ecclesia numquam sint conjuncti: Id in Hollandia

instrumentum executum before a magistrate in Holland, which is entitled there to immediate execution, but not by common right, it will not have the same effect here, but will require an examination of the facts and judgment. The reason is that the statute of limitations and execution do not pertain to the substance of the contract but to the time and mode of bringing suit, which constitutes in itself a quasi-contract and a separate transaction. It is recognized, therefore, upon very good grounds, that in matters of procedure the practice of the place where the suit is brought is observed, even with respect to a transaction which has been entered into elsewhere. This is taught by John à Sande, *lib. 1, tit. 12, def. 5*, where he states that even as regards the execution of foreign judgments the law of the place where the execution is asked is to be observed and not that of the place where the judgment was rendered.

8. Marriage also is governed by the same rules. If it is lawful in the place where it is contracted and celebrated it is valid and effectual everywhere, with the reservation that it does not prejudice others; to which reservation may be added that its example is not too revolting—for example, if an incestuous marriage in the second degree, according to the law of nations, should happen to be allowed anywhere, which is scarcely supposable. In Frisia it is a valid marriage if a male and female agree to marry and recognize each other as husband and wife, although no religious ceremony was performed. In Holland it

pro matrimonio non habetur. Frisii tamen Conjuges sine dubio apud Hollandos jure Conjugum, in lucris dotium, donationibus propter nuptias, successionibus liberorum aliisque fruentur. Similiter, Brabantus uxore ducta dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet haec observatio; Saepe fit, ut adolescentes sub Curatoribus agentes furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus Curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quae apud nos hac parte cessant. Celebrant ibi matrimonium et mox redeunt in Patriam. Ego ita exisitimo, hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse Magistratus heic obligatos, e jure Gentium, ejusmodi nuptias agnoscere et ratas habere: Multoque magis statuendum est, eos contra Jus Gentium facere videri, qui civibus alieni imperii sua facilitate, jus Patriis Legibus contrarium, scientes volentes, impertiuntur.

9. Porro, non tantum ipsi contractus ipsaeque nuptiae certis locis rite celebratae ubique pro

would not constitute a marriage. The Frisian spouses will enjoy nevertheless in Holland, without doubt, the rights of husband and wife as regards marriage settlements and the rights of children to inherit the property of their parents, etc. In like manner, if an inhabitant of Brabant, who has married with papal dispensation within the prohibited degrees, should remove to this place the marriage will be recognized. If a Frisian, however, should go with the daughter of his brother to Brabant and be married there the marriage would not be recognized on his return to this place; because in this manner our law would be evaded by the worst examples, concerning which I should like to make the following observation: It often happens that young people under guardianship, desiring to unite their secret desires through the bonds of matrimony, go to eastern Frisia or to some other place where the consent of their guardian is not necessary to marriage, according to the provisions of the Roman law, which has been abrogated with us on this point. They celebrate their marriage there and presently return home. I consider this a manifest evasion of our law. Our magistrates are not bound therefore by the law of nations to recognize and give effect to marriages of this kind. And those especially would seem to act against the law of nations who marry citizens of another state by its facility, knowing such law to be contrary to their home legislation.

9. Furthermore, not only are the marriage contracts themselves, duly entered into in a cer-

justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt. In Hollandia conjuges habent omnium bonorum communionem, quatenus aliter pactis dotalibus non convenit; hoc etiam locum habebit in bonis sitis in Frisia, licet ibi tantum sit communio quaestus et damni, non ipsorum bonorum. Ergo et Frisii conjuges manent singuli rerum suarum, etiam in Hollandia sitarum, Domini: cum primum vero conjuges migrant ex una provincia in aliam, bona, quae deinceps alteri adveniunt, cessant esse communia manentque distinctis proprietatibus; sicut res antea communes factae manent in eo statu juris, quem induerunt, ut docet Sandius *lib. 2, decis. tit. 5, def. 10*, ubi in fine testatur, inter consuetudinarios Doctores esse controversum, an immobilia bona etiam alibi sita in tali specie communicentur, quod nos affirmandum putamus. Ratio dubitandi, quod Leges alterius Reip. non possint alieni territorii partes integrantes afficere; sed responsio est duplex: prima, non fieri hoc vi legis alienae immediata, sed accedente consensu Potestatis summae in altera Civitate, quae legibus alienis in loco suo exer-

tain place, to be regarded as binding and valid everywhere, but the rights and interests also attached thereto by the law of the place where they were celebrated. In Holland the spouses have a community of all their property unless they have stipulated otherwise in a marriage contract; this will be the effect with respect to the property situated in Frisia, although the community of property existing there is only of profit and loss and not of the property itself. Therefore Frisian spouses will remain the separate owners of their property even if it is situated in Holland. When the spouses migrate, however, from one province into another the property which may thereafter come to either will not be community property, but remain their separate property; and the property which had become community property before will retain the legal status which it had acquired, as is laid down by John à Sande, *lib. 2, decis. tit. 5, def. 10*, where it is stated at the end that there was a controversy among the doctors of the common law whether immovables situated in another country were to be affected in like manner, in regard to which question we believe an affirmative answer must be given. The reason for the doubt was that the laws of one state cannot affect the integral parts of another territory. But the answer is a twofold one. In the first place, it is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state, that effect is given to foreign laws exercised upon prop-

citis praebebet effectum; sine suo suorumque praejudicio, mutuae populorum utilitatis respectu, quod est fundamentum omnis hujus doctrinae. Altera responsio est, non tantum hanc esse vim Legis, sed etiam consensum partium bona sua invicem communicantium, cujus vi mutatio domini non minus per matrimonium quam per alios contractus fieri potest.

10. Verum tamen non ita praecluse respiciendus est locus, in quo Contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit, l. 21. de O, et A.* Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die fit, homines in Frisia indigenas aut incolas ducere uxores in Hollandia, quas inde statim in Frisiam deducunt; idque si in ipso contractu ineundo propositum habeant, non oritur communio bonorum, etsi pacta dotalia sileant, secundum jus Hollandiae, sed jus Frisiae in hoc casu est loci Contractus.

11. Datur et alia limitationis saepe dictae applicatio, in hoc articulo; Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creatur praejudicium, in jure

erty within its territory, out of respect for the mutual convenience of the nations, provided, however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens, which is the foundation of the whole subject. The second answer is that it is not so much by force of law as by the consent of the parties reciprocally communicating their property rights to each other, by which means a change of property may be effected, no less from matrimony than from other contracts.

10. The place, however, where a contract is entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control. "Everyone is deemed to have contracted in that place, in which he is bound to perform." (Digest, 44, 7, 21.) Hence the place of matrimony is not so much the place where the ceremony is performed as the place where the contracting parties intended to live. It happens every day that men in Frisia, natives as well as residents, marry wives in Holland whom they immediately bring into Frisia. And if they had such an intention at the time of the marriage there will be, in the absence of a marriage contract, no community of property according to the law of Holland; the Frisian law will be the place of the contract in this case.

11. There is in this connection a further application of the restriction often mentioned: the effects of contracts made in a particular place will be recognized elsewhere in accordance with the law of the former place, if no prejudice result therefrom

sibi quaesito, ad quod Potestas alterius loci non tenetur neque potest extendere jus diversi territorii. Exemplum: Hypotheca conventionalis antiquior in re mobili, dat πρωτοπραξίαν jus *Praelationis*, etiam contra tertium possessorem, Jure Caesaris et in Frisia, non apud Batavos. Proinde si quis ex ejusmodi hypotheca in Hollandia agat adversus tertium, non audietur; quia jus illi tertio in ista re mobili quaesitum per jus alieni territorii non potest auferri. Ampliamus hanc regulam tali extensione; Si jus loci in alio Imperio pugnet cum jure nostrae civitatis, in qua contractus etiam initus est, confligens cum eo contractu, qui alibi celebratus fuit: magis est, ut jus nostrum quam jus alienum servemus. Exemplum: In Hollandia contractum est matrimonium cum pacto, *ne uxor teneatur ex aere alieno a Viro solo contracto*; Hoc etsi privatim contractum valere dicitur in Hollandia, cum Praejudicio creditorum, quibus Vir postea obligatus est: in Frisia id genus pacta non valent, nisi publicata, nec obstant ignorantiam allegantibus justam, idque recte secundum jus Caesarum et aequitatem. Vir in Frisia contrahit aes alienum, uxor hic pro parte dimidia convenitur. Opponit pactum dotale suum; Creditores replicant, Jure Frisiae, non esse

to the citizens of such other country with respect to rights acquired by them, and the sovereignty of the latter place is not bound to extend, nor can it extend, the law of another territory so far. For example: a prior hypothecation by agreement of movable property confers πρωτοπραξίαν "a right of priority," even against a third possessor according to the law of Caesar and in Frisia, but not according to the Batavians. Hence if someone should proceed against a third party in Holland by virtue of such a hypothecation he would not succeed because the rights of the third party in the movable property cannot be destroyed by the law of another territory. We may enlarge the rule to the following extent: if the law of the place of contracting is contrary to the law of our state, in which a contract is also made, inconsistent with the contract which is entered into elsewhere, it is reasonable that we should observe our own law rather than the foreign law. For example: in Holland matrimony is contracted with the agreement that the wife shall not be liable for the debts contracted by the husband alone. Although it is a private contract it is said to be valid in Holland, to the prejudice of creditors to whom the husband may become later indebted. In Frisia such contracts would not be valid unless published, nor would ignorance of this fact constitute an excuse according to the law of Caesar and equity. The husband contracts a debt in Frisia and his wife is sued here for one-half the amount. She pleads the marriage contract. The creditors reply that by Frisian law the agree-

locum huic pacto, quia non est publicatum, et hoc praevallet apud nos in contractibus heic celebratis, ut nuperrime consultus respondi. Sed qui in Batavia contraxerunt, etsi agentes in Frisia, tamen repellentur; quia tum simplex unumque; jus loci contractus, non duplex, venit in considerationem.

12. Ex Regulis initio collocatis etiam hoc axioma colligitur. *Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personae alibi gaudent vel subjecti sunt, fruuntur et subjiciantur.* Hinc qui apud nos in Tutela, Curave sunt, ut adolescentes, filiifam., prodigi, mulieres nuptae, ubique pro personis Curae subjectis habentur, et jure, quod Cura singulis in locis tribuit, utuntur fruuntur. Hinc qui in Frisia veniam aetatis impetravit, in Hollandia contrahens ibi non restituitur in integrum. Qui prodigus heic est declaratus, alibi contrahens valide non obligatur neque convenitur. Rursus in quibusdam Provinciis qui viginti annos excessere pro *majoribus* habentur, et possunt alienare bona immobilia, aliaque jura minorum exercere in illis etiam locis, ubi ante viginti quinque annos nemo censetur esse major; Quia Legibus rebusque judicatis aliarum Civitatum in suos sub-

ment is not valid because not published, and this contention prevails with us with respect to contracts entered into here, as I gave recently as my opinion when I was consulted. But those who contracted in Holland, notwithstanding such suit was brought in Frisia, were nonsuited because the law of the place of contracting came into consideration as the law of a single country and not as that of two countries.

12. From the rules laid down at the beginning the following maxim may also be derived: personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place. Hence persons who with us are under tutors or curators, as young men, prodigals, or married women, are regarded everywhere as persons subject to curators, and will possess and enjoy such rights as the local law and guardianship bestow. Hence he who has bestowed upon him the rights of a person of age in Frisia will not be granted restitution in Holland with respect to contracts entered into there. In the same way he who is declared a prodigal will not be bound by contracts entered into elsewhere. Again, in some provinces persons above the age of 21 are regarded as of age and may alienate their immovable property and exercise other rights going with majority even in those places where a person becomes of age only at 25, because whatever qualities are assigned to their subjects by the laws and judgments of any state

jectos quaelibet aliae potestas comiter effectum tribuunt; quatenus suo suorumque juri quaesito non praejudicatur.

13. Sunt, qui hunc effectum qualitatis personalis ita interpretantur, ut qui certo loco, major aut minor, pubes aut impubes, filius aut paterfam. sub curatore vel extra Curam est, ubique tali jure fruatur eique subjiatur, quo fruitur et cui subjiatur in eo loco, ubi primum talis factus est aut talis habetur: proinde, quod in patria potest aut non potest facere, id eum nusquam non posse vel prohiberi facere. Quares mihi non videtur habere rationem, quia nimia inde *σύγχυσις* jurium et onus pro vicinis ex aliorum legibus oriretur. Exemplis momentum rei patebit. Filiusfam. in *Frisia* non potest facere testamentum. Proficiscitur in *Hollandiam* ibique facit testamentum; quaeritur, an valeat. Puto valere utique in *Hollandia*, per *Regulam primam et secundam*, quod leges afficiant omnes eos, qui sunt in aliquo territorio: nec civile sit, ut Batavi de negotio apud se gesto, suis legibus neglectis, secundum alienas judicent. Attamen verum est, id heic in *Frisia* non habiturum esse effectum, per *regulam tertiam*, quod eo modo nihil facilius foret quam Leges nostras a Civibus eludi, sicut eluderentur omni die. Sed alibi tale testamentum valebit, etiam ubi filiisfam. non licet facere testamentum, quia cessat

will be given effect elsewhere, as long as no prejudice results therefrom to the rights of such government or to its citizens.

13. There are those who interpret the effect of a personal quality in another way. According to them he who according to the law of a certain country is of age or is under age, a puber or impuber, a house-son or *pater familias*, under guardianship or free from guardianship, will be governed everywhere as regards the consequence of this status by the very law which conferred such status upon him; so that what he can do or cannot do in his own country he ought to be allowed to do or to be prohibited from doing everywhere. This opinion does not seem to me well founded; there would result therefrom too great a confusion of rights, and from the laws of some states too great a burden for their neighbors. Some examples will make this clear. A house-son in Frisia cannot make a will. He goes into Holland where he makes a will. The question is whether it is valid. I think it is. At all events in Holland, by virtue of the first and second maxims, because the laws of a state apply to all within its territory. Nor is it just that as regards acts done within their territory the Dutch shall put aside their own law and decide the case according to foreign law. But it will have no validity in Frisia, in accordance with the third maxim, because by that means nothing would be more easy for our citizens than to evade our laws, and they might be evaded every day. But elsewhere such a will would be valid even where by their laws a house-son could not make a will because

ibi illa ratio eludendi juris patrii per suos cives; quod in tali specie non foret commissum.

14. Hoc exemplum spectabat actum ob personalem qualitatem domi prohibitum. Dabimus aliud de actu domi licito, sed illic, ubi celebratus est, prohibito, in suprema Curia quandoque judicatum. *Rudolphus Monsema* natus annos XVII *Groningae* diebus quatuordecim, postquam illuc migraverat, ut pharmaceuticam disceret, Testamentum condiderat, quod ei in Frisia liberum erat facere, sed *Groningae*, ait *D. Nauta* Relator hujus judicati, non licet idem puberibus *infra XX annos, nec tempore morbi fatalis, neque de bonis hereditariis ultra partem dimidiam*. Decesserat ex eo morbo adolescens, herede Patruo, materis legato dimissis, quae testamentum dicebant nullum, utpote factum contra jus loci. Heres urgere, personalem qualitatem ubique circumferri et jus ei in Patria competens alibi quoque valere: sed judicatum est contra testamentum, convenienter ei, quod diximus, praesertim cum heic eludendi juris patrii affectatio nulla fuisset, etsi minime consentientibus suffragiis, *Nauta* quoque dissentiente. *Decis. M. S. 134. Anno. 1643. d. 27, Octobris.*

15. Fundamentum universae hujus doctrinae diximus esse et tenemus subjectionem hominum *infra Leges* cujusque territorii, quamdiu illic agunt, quae facit,

in such a case there would be no evasion of the domestic law by subjects thereof and the above reason would therefore not apply.

14. The example I have given refers to an act which was prohibited at home on account of a personal quality. We shall give another act allowed at home, but prohibited where it was done, decided sometime ago by our Supreme Court: *Rudolph Monsema*, who was born and lived at *Groningen*, when he was seventeen years and fourteen days old went abroad to learn the business of a druggist. He made a will which he could have made in *Frisia*, but at *Groningen*, according to *Dr. Nauta*, the reporter of this decision, infants under twenty years of age are not allowed to do so, not even at the time of their last illness, for more than one-half their patrimony. The young man died of the sickness, leaving his uncle on his father's side as his heir and leaving nothing to his aunts on his mother's side, who contended that the will was void because it was made in violation of the law of the place. The heir urged that a personal quality accompanies the person everywhere, and that, as he could have made the will at home, he could make it abroad. But the decision was given against the will, consistently with what we have said, especially since there was no intention to evade the home law. The decision was, however, by no means universally approved, *Nauta* himself dissenting. (*Decis. M. S. 134. October 27, 1643.*)

15. The foundation of all this doctrine we have said and maintained to be the subjection of all men to the laws of a country so long as they remain therein;

ut actus ab initio validus aut nullus alibi quoque valere aut non valere nequeat. Sed haec ratio non convenit rebus immobilibus, quando illae spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certae notae Lege cujusque Reipublici ubi sita sunt, illis impressae reperiuntur; hae notae manent indelebiles in ista Republici. quicquid aliarum Civitatum Leges aut privatorum dispositiones secus aut contra statuant; nec enim sine magna confusione praejudicoque Reipublici ubi sitae sunt res soli, Leges de illis latae, dispositionibus istis mutari possent. Hinc Frisius habens agros et domos in provincia Groningensi non potest de illis testari, quia Lege prohibitum est ibi de bonis immobilibus testari, non valente Jure Frisico adficere bona, quae partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit Testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia Legum diversitas in illa specie non afficit res soli neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, Lex Reipublici non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a Lege loci impressus laeditur aut imminuitur. Haec observatio locum etiam in Contractibus habet: quibus in *Hollandia* venditae res soli Frisici, modo in *Frisia* prohibito,

whence it follows that an act valid or invalid from the beginning is also valid or invalid elsewhere. But this observation does not apply to immovables when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated; such qualities remain unaffected in such state irrespective of what the laws of other states or the agreements of individuals may provide to the contrary. For it is evident that the laws applicable to such property, enacted by the state in which the immovable property is situated, cannot be changed by such disposition without great confusion and prejudice to the state. Hence a Frisian who owns fields and houses in the province of Groningen cannot dispose of them by will, because it is prohibited there to dispose of immovables by will, for the Frisian law cannot affect property which constitutes an integral part of another territory. But is this not opposed to what we stated above, that if a will is validly executed according to the law of the place it should have effect even as to property situated elsewhere, where it is lawful to dispose of it by will? No, because the diversity of laws in this respect does not concern immovable property but regulates wills. The will having been properly made, the law of the state does not invalidate it as regards immovable property so far as no quality impressed upon it by the law of the place is affected or impaired.

licet, ubi gestus est, valido, recte venditae intelliguntur; idemque in rebus non quidem immobilibus, at solo cohaerentibus; uti si frumentum soli Frisici in *Hollandia* secundum *lastas*, ita dictas, sit venditum, non valet venditio, nec quidem in *Hollandia* secundum eam jus dicetur, etsi tale frumentum ibi non sit vendi prohibitum, quia in Frisia interdictum est et solo cohaeret ejusque pars est. Nec aliud juris erit in successione ab intestato; Si defunctus sit Paterfamilias, cujus bona in diversi(s) locis imperii sita sunt, quantum attingit ad immobilia servatur jus loci, in quo situs eorum est; quoad mobilia, servatur jus, quod illic loci est, ubi testator habuit domicilium, qua de re vide Sandium *lib. 4, decis. tit. (VIII) def. 7*. Sunt hae definitiones ejusmodi, ut a latiori explicatione non abhorreant, quando Statutarii Scriptores non desunt, qui de nonnullis aliter existimaverint, quos vide laudatos apud Sandium in Decisionibus praedictis, quibus adde, quae novissime tradit Rodenburgius *tract. de jur. quod orit. e Stat. divers. inserto libro de jure Conjugum*.

This rule applies also to contracts. Frisian immovable property, sold in Holland in a manner prohibited by Frisian law but allowed in Holland, is deemed lawfully sold, and this is true, not only as regards the immovables themselves, but also with respect to things attached to the soil, so that if corn growing in Frisia is sold in Holland according to the *lasts*, as it is called, the sale is not valid—not even in Holland—although the sale of such corn is not forbidden there, because it is prohibited in Frisia and because it is attached to the soil and is a part of it. The same rule applies to intestate succession. If the decedent is the father of a family whose property is situated in different parts of the country, the law of the situs governs as regards immovables. But with respect to movables the law of the place where the testator had his domicile is applied, for which see John à Sande (*lib. 4, decis. tit. VIII def. 7*). These rules are such that a fuller explanation might be given, inasmuch as writers are not wanting who think otherwise in some particulars, and who are mentioned by John à Sande in the decisions referred to above, to which add Rodenburg's recent "*Tract. de jure quod orit. e stat. divers.*," which is appended to his work on the law of husband and wife.

7. STORY'S COMMENTARIES ON THE CONFLICT OF LAWS—ONE HUNDRED YEARS AFTER*

IN 1834 Story published the first edition of his *Commentaries on the Conflict of Laws*.¹ With the publication of this work, it is now generally admitted,² a new era began in the treatment of the subject. Italian, French, Belgian, Dutch, and German writers, among whom are to be found the greatest jurists of their time, had preceded Story in dealing with these questions. Bartolus, Dumoulin, D'Argentré, Rodenburg, John and Paul Voet, Huber, Froland, Boullenois, Bouhier, Cocceji, and Hert are a few of the names.³ The writers lived in different ages and under different social and political conditions. Questions of the conflict of laws attracted the attention of the Italian jurists as early as the twelfth century. In northern Italy independent bodies of customary law had developed, especially in the municipalities, which prevailed over the more general law. In the absence of a particular provision of local law the common law, namely, Roman law, prevailed. The problems of the conflict of laws arose chiefly between the inhabitants of these municipalities. At first the law of the forum⁴ was applied to these

* (1934) 48 Harvard Law Review 15.

1. Joseph Story was born in Marblehead, Massachusetts, September 18, 1779. He was graduated from Harvard College in 1798 and was admitted to the bar in 1801. In 1811, while Speaker of the Massachusetts House of Representatives, he was appointed to the Supreme Court of the United States. In 1829 Story was elected Dane Professor of Law at Harvard University, which position he held, together with that of Associate Justice of the Supreme Court, until his death, September 10, 1845.

Story was the author of many books. In his earlier years he compiled a work on PLEADING (1805); and edited CHITTY on BILLS AND NOTES (1809), ABBOTT on SHIPPING (1810), and LAWES on PLEADING IN ASSUMPSIT (1811). As Dane Professor of Law he published works on BAILMENTS (1832), the CONSTITUTION OF THE UNITED STATES (1833), CONFLICT OF LAWS (1834), EQUITY JURISPRUDENCE (1836), EQUITY PLEADING (1838), AGENCY (1839), PARTNERSHIP (1841), BILLS OF EXCHANGE (1843), and PROMISSORY NOTES (1845).

2. HARRISON, ON JURISPRUDENCE AND THE CONFLICT OF LAWS (1919) 119 (published originally in the *Fortnightly Review* in 1878 and 1879); GUTZWILLER, DER EINFLUSS SAVIGNY'S (1923) 111.

3. 1 LAINÉ INTERODUCTION AU DROIT INTERNATIONAL PRIVÉ (1888), II (1892).

4. See 2 NEUMEYER, DIE GEMEINRECHTLICHE ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS (1916) 1 *et seq.*

disputes, but in the course of time more modern doctrines were developed. According to Magister Aldricus, whom Professor Neumeyer regards as the founder of the science of private international law, the questions of the conflict of laws should be decided with reference to the law which is "the more powerful and useful."⁵ Apparently the judge is to decide the case with reference to the law which shall bring about justice. The development of the conflict of laws reached its height in Italy in the fourteenth century through the genius of the greatest of all jurists of the middle ages—Bartolus of Sassoferrato (1314–1357).⁶

In France, however, difficulties in the conflict of laws arose between the inhabitants of the different provinces of a politically united kingdom. These questions seem to have come for decision before the Parliament of Paris and the Exchequer of Normandy as early as the thirteenth century.⁷ In the sixteenth century the subject of the conflict of laws was given a profound stimulus in France by the opposing views of Dumoulin (1500–1566) and D'Argentré (1519–1590). Dumoulin placed the emphasis upon the "personal" statute (*lex domicilii*) whereas D'Argentré, influenced by the feudal notions prevailing in his native Brittany, urged the claims of the "territorial" law (*lex rei sitae*). Froland, Boullenois, and Bouhier developed D'Argentré's doctrine in the eighteenth century.⁸

The questions of the conflict of laws presented themselves under a still different aspect to the Dutch writers of the seventeenth century—Paul Voet (1619–1677), John Voet (1647–1714), and Ulricus Huber (1636–1694).⁹ In Italy they had been intermunicipal; in France, interprovincial; and in Holland they were looked upon for the first time as international. The Dutch provinces had just gained their independence. An extreme jealousy of their local rights existed between them. This fact, coupled with the growing commerce with foreign nations, caused them to regard the questions of the conflict of laws as arising between independent sovereignties. This led to the announcement of the doctrine of the "territoriality" of law in a more absolute sense than that proposed by D'Argentré.

The most important authors belonging to the early German

5. 2 NEUMEYER, *op. cit. supra* note 4, at 67.

6. BARTOLUS, *CONFLICT OF LAWS* (Beale's trans. 1914).

7. See MEIJERS, *BIJDRAGE TOT DE GESCHIEDENIS VAN HET INTERNATIONAAL PRIVAATEN STRAFRECHT IN FRANKRIJK EN DE NEDERLANDEN* (1914); *Nieuwe Bijdrage tot het ontstaan van het beginsel der Realiteit* (1922) 3 *TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 61.

8. 1 LAINÉ, *op. cit. supra* note 3, at 422.

9. See Lorenzen, *Huber's De Conflictu Legum* in WIGMORE'S *CELEBRATION LEGAL ESSAYS* (1919) 199.

school of the conflict of laws are Cocceji (1644–1719) and Hert (1652–1710), Cocceji being the first German who attempted to establish a general theory of the conflict of laws.

The continental writers referred to, living as they did in different ages, in different countries, and under different conditions, naturally reflected the ideas of their times. The Italian writers employed the scholastic method of their day. D'Argentré reflected the feudal notions of his native land. The Dutch writers were under the influence of their great compatriot Grotius. Not only did the different schools—the Italian, French, Dutch, and German—differ from each other, but there was considerable variation in the views of the writers belonging to each school. However, they employed a common method in dealing with the problems of the conflict of laws, which is commonly called the “statutory” method.¹⁰ They all started from the same premise. From first to last they examined the different laws—city laws in Italy, provincial laws in France, or the laws of the particular states in Germany—to ascertain whether they concerned person, things, or acts. If it concerned persons, the enactment in question was known as a “personal” statute, governed by the law of the domicil. If it concerned things, it was known as a “real” statute, governed by the *lex rei sitae*. The term “mixed” statute was used by the different writers in various senses. Sometimes it had reference to acts and indicated that the *lex loci* controlled. Other writers employed it when the statute was deemed to refer partly to persons and partly to things. Whatever progress was made in the conflict of laws between the thirteenth and nineteenth centuries on the continent was the result of the theoretical discussions mentioned. The courts contributed little, if any, to the development of the subject. The statutory theory was accepted in the legislation of the eighteenth century by the Maximilian Code of Bavaria of 1756¹¹ and in part by the Prussian Code of 1794.¹²

The insufficiency of the statutory method is seen clearly from the arbitrary and contradictory conclusions to which it led. For example, the incapacity of a married woman to contract without the authorization of her husband, the incapacity of a minor to sell property, or the incapacity of a house-son to make a will, which would seem to affect the person, was held by some

10. See 1 LAINÉ, *op. cit. supra* note 3, at 45 *et seq.*

11. I, 2, § 17.

12. Intr. §§ 22–42; 1 FÖRSTER AND ECCIUS, *PREUSSISCHES PRIVATRECHT* (7th ed. 1896) 53 *et seq.*; 1 DERNBURG, *PREUSSISCHES PRIVATRECHT* (5th ed. 1894) 51 *et seq.*; 1 KOCH, *ALLGEMEINES LANDECHT FÜR DIE PREUSSISCHEN STAATEN* (8th ed. 1884) 38–54.

writers to relate to things, governed by the law of the *situs*. Again, if the law of the *situs* governs things because of the control the local law has over the property, why was movable property excepted from such rule and placed under the law of the domicile? Or, if the *lex loci* governs acts for the reason that the parties are temporary subjects of the state, why are they not so subject for all purposes? Why apply the *lex domicilii* with respect to persons? Assuredly, a particular law may affect at the same time persons and things or persons and acts. Any attempt, therefore, to solve the problems of the conflict of laws on the basis of a classification of laws into those affecting persons, things, or acts is bound to fail. The voluminous discussions of the writers on the conflict of laws prior to Story are evidence of this fact. Story has referred to them in the following words: "Their works," he says, "abound with theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtleties, which perplex, if they do not confound, the inquirer."¹³

Problems of the conflict of laws did not come before the English courts before the middle of the eighteenth century. Since that time they have presented themselves in ever increasing number, particularly in consequence of the enormous expansion in trade since the early part of the nineteenth century. Moreover, a considerable number of disputes involving the conflict of laws came also before the courts of the United States. The result was that upwards of 500 decisions by Anglo-American courts relating to this subject existed at the time Story wrote his *Commentaries*.

Characteristic of Anglo-American law has been its development by the courts and not by legal writers. In dealing with questions of the conflict of laws, however, the English courts, prior to Story, relied to a large extent upon the discussions of continental writers, notably upon those of the Dutch school, whose territorial point of view appealed to the English judges. Huber's brief and concise commentary was most commonly cited. Very little had been done on the subject of the conflict of laws in England and America prior to Story. The most extensive English work on the subject was by Jabez Henry, who published in 1823 a work entitled *The Judgment of the Court of Demerara in the Case of Odwin v. Forbes*, to which was prefixed "A Treatise on the Difference Between Personal and Real Statutes," etc.¹⁴ In 1830 and 1831, Fortunatus Dwarrris published *A General Treatise on Statutes* containing a few pages

13. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1st ed. 1834)

§ 11.

14. Pp. 1-86.

relating to personal, real, and mixed statutes and certain elementary rules of the conflict of laws.¹⁵ In the United States Samuel Livermore had published, in 1828 in New Orleans, a work entitled *Dissertations on Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations*, consisting of 172 pages. Volume 2 of Kent's *Commentaries* contained a discussion of foreign marriages, divorces, judgments, and assignments.¹⁶ None of these works, however, was a comprehensive exposition of Anglo-American law.

Story's work consisted of 557 pages. It was divided into 17 chapters entitled, respectively, Introductory Remarks (1-18), General Maxims of International Jurisprudence (19-38), National Domicil (39-49), Capacity of Persons (50-99), Marriage (100-18), Marriage—Incidents to (119-67), Foreign Divorces (168-92), Foreign Contracts (193-307), Personal Property (308-57), Real Property (358-90), Wills and Testaments (391-402), Succession and Distribution (403-10), Foreign Guardianships and Administrations (411-43), Jurisdiction and Remedies (444-90), Foreign Judgments (491-515), Penal Laws and Offenses (516-22), Evidence and Proofs (523-32). Leaving out of consideration for the present the general maxims discussed in Chapter II, we find in Story's chapter headings the classifications which have been followed substantially by all writers since. Instead of discussing the problem of the conflict of laws under the three traditional points of view of "personal," "real," and "mixed" statutes, Story grouped them with respect to the subject matter to which they related. The subject of domicil, which is covered in 11 pages, presents the general characteristics which it has today in the United States. This statement is subject, however, to one or two important qualifications. As regards the domicil of married women, no exceptions were recognized in the time of Story to the general rule that a wife's domicil follows that of the husband.¹⁷ In the matter of domicil of choice, Story held that a domicil so acquired would be retained until the acquisition of a new domicil *facto et animo*, except where a person abandons a domicil of choice with an intention to resume his native domicil, in which event the latter is reacquired *in itinere*, while he is on his way.¹⁸ This modification of the general rule finds no support in the decisions of the courts of the United States today.

Under the title Capacity of Persons, Story discusses the topics generally dealt with by the civilians under the heading

15. Part II, at 647-51.

16. 2 KENT, COMMENTARIES ON AMERICAN LAW (1827) 78, 89, 101, 329.

17. See STORY, *op. cit. supra* note 13, § 49.

18. *Id.* § 48.

of Status and Capacity. The discussion includes not only the power of minors, married women, prodigals, and lunatics to contract and to transfer property, and the "capacity" to marry, but also the subject of legitimacy and illegitimacy and legitimation by subsequent marriage. Contrary to the civil law writers, Story holds that the American law looks to the *lex loci* as regards capacity to contract¹⁹ and to marry,²⁰ instead of to the law of the domicil. He justifies this rule on the grounds, (1) that the parties may be presumed to contract with reference to the law of the place where the contract was made and to be executed, and (2) because of the certainty and simplicity in its application.²¹ In the matter of marriage, an exception would doubtless be recognized, according to Story, in the case of incest and polygamy.²² Story's views have become the established law in the United States.²³

Differing from the continental writers, Story has no chapter devoted to the "formalities" of legal transactions. In continental literature the maxim *locus regit actum* denotes that the law of the place where the act is executed governs its formal requisites. Story uses it in a broader sense and applies it to the nature, obligation, and interpretation of contracts.²⁴ The same rule governs the formal requisites of contracts, according to Story, even so far as they fall within the Statute of Frauds.²⁵ The erroneous notion introduced later by *Leroux v. Brown*,²⁶ that the Statute of Frauds is procedural, and thus governed by the *lex fori*, finds no support in Story's *Commentaries*. As regards dispositions of land, *inter vivos* and by will, the law of the *situs* was held by Story to govern the formal requisites,²⁷ a doctrine early fixed in Anglo-American law. With respect to wills of personal property Story approved the general rule laid down by the courts that the law of domicil at the time of death controlled even in the matter of formal requisites.²⁸ The rigidity of the Anglo-American law led later to a modification of this rule by statute.

Story favors the view, upon principles of public policy, that

19. *Id.* § 76.

20. *Id.* § 89.

21. *Id.* § 76.

22. *Id.* § 89.

23. Some courts of the state of domicil have declined to recognize a foreign marriage, valid by the law of the place of celebration, which was entered into in evasion of the domiciliary law. See Beale, Laughlin, Guthrie, and Sandomire, *Marriage and the Domicil* (1931) 44 HARV. L. REV. 501.

24. STORY, *op. cit.* *supra* note 13, § 263.

25. *Id.* § 262.

26. 12 C. B. 801 (1852).

27. STORY, *op. cit.* *supra* note 13, §§ 435, 475.

28. *Id.* § 636.

marriage should be governed by the law of the place of celebration, even in cases of evasion, "with a view to prevent the disastrous consequences to the issues of such a marriage."²⁹ The incidents to marriage, especially the effect of marriage upon the property of the spouses, are stated by Story substantially as they would be today. As regards movables owned at the time of the marriage, he would apply the law of their matrimonial domicil, that is, the law of the state where they expected to make their home. Story says that the American decisions in support of the doctrine could be justified on the analogy to contracts by assuming a tacit matrimonial contract, "if it can be so treated," which would be governed by the law of the place of performance, or, if governed by the municipal law, without reference to any tacit contract, Story felt that the application of the law of the future domicil was "equally capable of a solid vindication."³⁰

In connection with the subject of divorce Story points out the difficult problems arising on the continent and between England and Scotland because of the divergency in the local legislation. Less than four pages are devoted to the law of the United States.³¹ Divorces, while not unknown in this country at the time, were not as easily obtained as they are today. The infrequency of foreign divorces is accounted for partly by the fact that married women at the time could not establish separate domicils. At the time of Story it was already the established law that the grounds for divorce were governed by the *lex fori*, and that a divorce obtained in a state in which both spouses had acquired a *bona fide* domicil would be recognized, even by the courts of the state in which the parties had their domicil at the time of the alleged offense, although there was no cause for divorce under the law of such state.

The subject of contracts is developed at length by Story.³² He deals with contracts in general and also with special classes of contracts, such as contracts relating to land, contracts for the purchase or sale of goods, and bills and notes. "Generally speaking," says Story, "the validity of a contract is to be decided by the law of the place, where it is made."³³ "Where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be gov-

29. *Id.* § 123.

30. *Id.* § 199.

31. STORY, *op. cit.* *supra* note 13, §§ 228-30.

32. *Id.* §§ 231-373.

33. *Id.* § 242.

erned by the law of the place of performance. This would seem to be a result of natural justice; and the Roman law has (as we have seen) adopted it as a maxim."³⁴ Story cites in support of the proposition Voet, Huber, and Boullenois and states that it has the general consent of foreign jurists. He cites in support also the dictum of Lord Mansfield in *Robinson v. Bland*,³⁵ Kent's *Commentaries*, and seven American cases decided by the United States Supreme Court, by a federal circuit court, and by the courts of New York and Massachusetts.³⁶ Story's view regarding the law governing the validity of contracts where the place of performance and that of the place of making do not coincide has been followed by a large number of cases in the United States, but it has been rejected by the American Law Institute.³⁷

Movables at the time of Story were regarded everywhere as subject to the law of the owner's domicil. *Mobilia sequuntur personam* was an adage which expressed the rule in the conflict of laws since the early days when the question was discussed. "It has so general a sanction among all civilized nations," says Story, "that it may be treated as a part of the *jus gentium*."³⁸ Story admits, however, that the legislation of the place where the property is situated, having actual control over the *res*, has the power to dispose of it in accordance with its law, but queries how far courts of justice ought, upon their own authority, to interpose such a limitation, independently of legislation, "since the doctrine, which it unfolds, aims a direct blow at the soundness of the policy, on which the general rule, that personal property has no locality, is itself founded."³⁹ It was only in the second half of the nineteenth century that the importance of legal transactions relating to personal property produced a fundamental change in the point of view which led to the adoption of the rule that the law of the *situs* should control rights in movables as well as in immovables.

34. *Id.* § 280.

35. 2 Burr. 1077, 1078 (K. B. 1760). It has been charged that the law of the place of performance is inconsistent with the principles of the common law, being an importation from the civil law. Beale, *What Law Governs the Validity of a Contract* (1909) 23 HARV. L. REV. 1, 6 *et seq.* Such a charge can be supported, however, only if a preconceived view is taken of what constitutes the common law. Moreover, in the light of its long pedigree, both in England and the United States, it would seem to be as much entitled to recognition as a legitimate offspring of the common law as any other doctrine of the conflict of laws, which may have been first adopted on the continent.

36. STORY, *op. cit. supra* note 13, § 281, n.7.

37. RESTATEMENT, CONFLICT OF LAWS (1934) § 332.

38. STORY, *op. cit. supra* note 13, § 380.

39. *Id.* § 390.

That rights in immovables were subject to the law of the *situs* has been established in Anglo-American law in a much more absolute sense than it ever was on the continent. Thus, it had become fixed law in the time of Story that it controlled in the matter of conveyancing, both the capacity of the parties, the formalities with which the deed must be executed, as well as the extent of the interest to be conveyed.⁴⁰ Likewise, the effect of marriage upon immovables, owned by the spouses at the time of marriage or subsequently acquired, and any other interest claimed in immovable property by operation of law could be determined only with reference to the *lex rei sitae*.⁴¹

In the law of wills and succession the same principle was recognized, so that immovables would pass in case of intestacy to the heirs specified by the law of the *situs*. Wills disposing of immovable property had to conform to the law of the *situs*, both as to the capacity of the testator, the formalities with which the will had to be executed, and the validity of the will in any other respect.⁴² Movable property, on the other hand, would be distributed in case of intestacy in accordance with the law of the decedent's domicil at the time of his death. This law controlled also the formalities of such wills and their validity in other respects.⁴³ These characteristic features of the common law, settled already in the time of Story, have been modified since his day only, by statute, as regards the formal execution of wills, by liberalizing the rules relating thereto. On the continent, owing to the doctrine of universal succession, both movable and immovable property is frequently subject to the same law.

In the settlement of decedents' estates, likewise, a wide distinction is made between movable and immovable property.⁴⁴ The views announced by Story in this regard, as well as his observations relating to foreign guardianships, have remained the basic principles of our law.

In the chapter on Jurisdiction and Remedies, Story outlines the fundamental rules of jurisdiction which characterize Anglo-American law and differ widely from the rules on the continent. Most important of these is the foundation of jurisdiction *in personam* upon mere personal service. Such jurisdiction is claimed not only as to citizens, but also as to foreigners who happen to be momentarily in the state, without reference to the place where the contract was made or to be performed, where

40. *Id.* §§ 364, 428-31, 445.

41. STORY, *op. cit.* *supra* note 13, § 448.

42. *Id.* § 474.

43. *Id.* §§ 465-68.

44. *Id.* §§ 509 *et seq.*

the tort was committed or the like. With respect to jurisdiction over citizens domiciled abroad, "the extent of jurisdiction, which may be lawfully exercised over them *in personam*, is not so clear by acknowledged principles." ⁴⁵ So far as such exercise of jurisdiction comes before the courts of the state in which such citizens are domiciled, "the duty of recognising and enforcing such claim of sovereignty, is neither clear, nor generally admitted. The most, that can be said, is, that it may be admitted *ex comitate gentium*; but it may also be denied *ex justitiâ gentium*, wherever it is deemed injurious to the interests of foreign nations, or subversive of their policy or institutions." ⁴⁶

At the time Story wrote, the Fourteenth Amendment to the Constitution had not been adopted, and the carrying on of interstate business by corporations had not taken the developments of today. There was no special reason, therefore, for a discussion of the problem of jurisdiction over foreign corporations and the abuses of imported litigation.

Regarding the Statute of Limitations, Story approves the view held by Huber, Paul Voet, and others, that it concerns the remedy and is thus subject to the *lex fori*. He takes issue with those foreign jurists who regard the Statute of Limitations as affecting the substantive rights of the parties, arguing, (1) that foreigners are not entitled to crowd the tribunals of any nation with suits of their own, and, (2) "as little right can they have to insist, that the times, provided by the laws of their country, shall supersede those of the nation, in which they have chosen to litigate their controversies." ⁴⁷ Story suggests, however, a possible distinction where the Statute of Limitations of a particular country not only extinguishes the right of action, "but the claim or title itself, *ipso facto*," and the parties are resident within the jurisdiction during the entire period. Under such circumstances title to personal property held adversely has been recognized, and Story intimates, though he does not state so expressly, that a similar doctrine might be justifiable in cases where a debt is extinguished by reason of the expiration of the Statute of Limitations. ⁴⁸

Judgments of foreign countries at the time of Story were regarded both in England and the United States merely as *prima facie* evidence to sustain the action, and to be deemed right until the contrary is established. ⁴⁹ Since that date they have

45. *Id.* § 540.

46. *Ibid.* Cf. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 47(2), 80.

47. STORY, *op. cit.* *supra* note 13, § 578.

48. *Id.* § 582.

49. *Id.* § 603.

been deemed conclusive in England and in most of the states of this country in which the question has arisen.

The subject of crimes in its international aspects is dealt with to a very limited extent.⁵⁰ Under the chapter heading of Penal Laws and Offenses Story states that the common law "considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed."⁵¹ For the same reason a disability imposed for conviction of crime has no extraterritorial effect. Regarding the extradition of criminals, Story agrees with the view that a sovereign is not bound to render up fugitive criminals from other countries. The enforcement of "penal" laws in disputes between private individuals is not alluded to.

In the final chapter, entitled Evidence and Proofs, Story lays down the established doctrine of Anglo-American law that courts will not take judicial notice of the laws of a foreign country, but that they must be proved as facts.⁵² He also deals with what he calls a "most embarrassing, and as yet (in a great measure) unsettled class of questions"⁵³ relating to the mode of proving foreign contracts, instruments, and other acts. Story points out that the competency of witnesses is governed in the common law by the *lex fori*, but intimates that where the only witness to a contract is incompetent, on account of interest, by the common law, but competent by the law of the place where the contract was made, his testimony might be admissible.⁵⁴ So far as the Statute of Frauds is involved or the requirement of a stamp, the instrument not being admissible in evidence unless it is properly stamped, Story holds that "in all these cases the proper proof would doubtless be given in conformity with the local law."⁵⁵

If we compare this summary of Anglo-American law on the subject of the conflict of laws as it was one hundred years ago with the law of today, we find that it has changed only in minor respects. Its fundamental views and conceptions are the same. Story first formulated them, and where they were not firmly established at the time, they became so, thanks to the great esteem in which his work was held.

A second and considerably enlarged edition of Story's *Commentaries* appeared in 1841, and a third edition, containing the

50. STORY, *op. cit. supra* note 13, §§ 619-28.

51. *Id.* § 620.

52. *Id.* § 637.

53. *Ibid.*

54. *Id.* § 635.

55. *Id.* §§ 262, 631. Cf. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 598, 602.

author's last revisions, was published in 1846, after his death. By this time the size of the book had grown to 1068 pages. The fourth edition was published by E. H. Bennett, in 1852; the fifth edition by the same editor, in 1857; a sixth edition by Isaac F. Redfield, in 1865; a seventh edition by E. H. Bennett, in 1872; and an eighth edition by Melville M. Bigelow, in 1883.

Characteristic of Story's work is his detailed consideration of the views of continental writers, from which he quotes copiously. Story says that in the preparation of his *Commentaries* he has availed himself chiefly of the writings of Rodenburg, the Voets (father and son), Froland, Boullenois, Bouhier, and Huber "as embracing the most satisfactory illustrations of the leading doctrines."⁵⁶ Most references are to Boullenois, but great reliance is placed upon Huber, of whom he writes, "Some attempts have been made, but without success, to undervalue the authority of Huberus. . . . It is not, however, a slight recommendation of his works, that hitherto he had possessed an undisputed preference on this subject over other continental jurists, as well in England as in America."⁵⁷ Of the German writers Story consulted only those who wrote in Latin; many references are to be found to Hert's *De Collisione Legum*.

At the time of their publication Story's *Commentaries on the Conflict of Laws* made a profound impression. Not only did they become the authoritative work upon the subject in the United States, but they were held in very high regard in England. Burge said of Story's *Commentaries* in 1838, "His Treatise on the conflict of laws . . . is cited by English judges with the high commendation it so justly merits, . . ."⁵⁸ Frederic Harrison said in 1879 that "from the date of its appearance hardly a single case on this subject in America or in England, and perhaps few on the Continent, have ever been decided without some reference to this learned book."⁵⁹ Dicey, in 1912, emphasized Story's "powerful common sense and extensive legal learning,"⁶⁰ saying also, "The great merits of Story must be acknowledged by every one who can recognize the strength and solidity of good legal thinking."⁶¹ In France, Foelix became an enthusiastic follower. He says, in 1843, "This result, to which we have been led by our researches and meditations, we find confirmed and developed in the learned work of Story. . . . We have not hesitated to adopt this doctrine, and we have fol-

56. STORY, *op. cit. supra* note 13, § 11, n.2.

57. *Id.* § 31.

58. 1 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS (1838) xi.

59. HARRISON, *loc. cit. supra* note 2.

60. (1912) 28 L. Q. REV. 341, 342.

61. Dicey, *loc. cit. supra* note 60.

lowed it throughout our work." ⁶² For half a century Foelix's treatise was the standard work on the conflict of laws in France and as such had a considerable influence upon the French decisions. In Germany, Professor Mittermaier reviewed, in 1835, Story's *Commentaries* at length in the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*,⁶³ in which he gave high praise to the American author. He dwells upon Story's "rare practical sense," ⁶⁴ combined with a "strict scientific training."⁶⁵ Half a century later Bar speaks of Story's "wondrous power of comparison," ⁶⁶ the "masterly fashion" ⁶⁷ in which he sets forth the Anglo-American decisions, and the "great subtlety" with which he criticizes "the details of the grounds of judgment." ⁶⁸ Savigny made constant use of Story's *Commentaries*, of which he says: "A remarkable picture of this imperfect but hopeful state of things is presented in the excellent work of STORY, which is also extremely useful, as a rich collection of materials for every inquirer." ⁶⁹

No work of importance had appeared in any country on the subject of the conflict of laws since the publication by Boulleinois of his *Dissertations sur Les Questions qui naissent de la contrariété des loix et des coutumes* (1732) and his *Traité de la Personnalité et de la Réalité des loix, coutumes, ou statuts* (1766). All the writers preceding Story had followed the statutory method, seeking to arrive at the solution of the problems of the conflict of laws by a classification of all laws into "personal," "real," and "mixed," a method which had proven barren of any definite results. Story likewise expresses some of the old ideas, but with him they constitute merely the veneer or "shell," ⁷⁰ but not the groundwork of his treatise. The substance of the *Commentaries* was based upon the decisions of Anglo-American courts. This constituted a new method and a complete break with that of the statutory school, the fetters of which Story helped to destroy in Europe.

At the time of their publication, in 1834, Story's *Commentaries* were without question the most remarkable and out-

62. 1 FOELIX, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ* (4th ed. by Demangeat, 1866), iv.

63. Volume 7 (1835) 228 *et seq.*

64. *Id.* at 229.

65. *Ibid.*

66. BAR, *PRIVATE INTERNATIONAL LAW* (Gillespie's trans. 1892) 47.

67. *Ibid.*

68. *Ibid.*

69. SAVIGNY, *PRIVATE INTERNATIONAL LAW* (Guthrie's trans. 1869) Preface 1-2.

70. GUTZWILLER, *op. cit. supra* note 2, at 111.

standing work on the conflict of laws which had appeared since the thirteenth century in any country and in any language. One hundred years have elapsed since then, during which, owing to the large increase in international trade and intercourse, the subject of the conflict of laws has gained greatly in importance. In the interval a large number of treatises on the subject have been written in many countries by some of the greatest jurists. Learned societies have been formed to study the problems of the conflict of laws. Legal periodicals have been established exclusively for the same purpose. International conventions have sought to unify the rules with reference to some of the most important topics. The United States this very year has witnessed the completion of a vast undertaking, the Restatement of the Conflict of Laws by the American Law Institute. During this century great changes have taken place also in the political or juridical conditions of the different countries. In France, Italy, and Germany, the law has been unified, so that before the World War the questions of the conflict of laws could arise in those countries only between such countries and foreign nations. As a result the interprovincial or interstate side of the conflict of laws largely disappeared. But, with the dislocation of physical boundaries as a result of the war, interprovincial law has for the time being gained renewed importance.⁷¹ In the United States the Federal Government has been forced since the time of Story to exercise powers formerly exercised by the states, notably in the field of interstate transportation, so as to prevent questions of the conflict of laws from arising in this field between the states of this country. The due process clause of the Fourteenth Amendment to the Federal Constitution has played an ever increasing rôle in limiting the freedom and power of the state courts and legislatures. In the light of all these developments, what place may Story's *Commentaries on the Conflict of Laws* be said to occupy today?

So far as Anglo-American law is concerned, important works on the subject of the conflict of laws have since been written in England by Westlake, Dicey, and Foote, which have taken Story's place as authoritative statements of the modern English law. In the United States no similar works have appeared. The only larger treatise on the subject is by Wharton,⁷² which made no distinct contribution to the subject. A century after their original publication, Story's *Commentaries* continue to be freely cited by the courts of the United States.

71. For example, in France, Poland, and Czecho-Slovakia.

72. A monumental treatise by Professor Beale is to be published in the near future.

On the continent many eminent jurists have been attracted by the conflict of laws since the time of Story. The following are among the familiar names,⁷³ in France, Foelix, Despagne, Weiss, Lainé, Audinet, Surville & Arthuys, Pillet, Vareilles-Sommières, Bartin, Niboyet, Arminjon, Valéry; in Belgium, Laurent, Rolin, Pouillet; in Germany, Savigny, Bar, Niemeyer, Zitelmann, Kahn, Neumeyer, Frankenstein, Gutzwiller, Lewald, Melchior, Nussbaum, Wolff; in Holland, Asser, Jitta, Koster; in Italy, Mancini, Fiore, Lomonaco, Catellani, Fusinato, Con-tuzzi, Diena, Anzilotti, Cavaglieri, Pacchioni, Ago; in Austria, Walker; in Switzerland, Meili, Roguin, Brocher. Some of these writers have set forth the law of the particular country to which they belonged. Most of them, however, wrote theoretical works dealing with the fundamental principles of the subject. Starting with *a priori* premises, for which the authors claimed universal validity, they erected thereon, largely by deductive processes, their "systems" of the conflict of laws. This is not the place to indicate differences in the points of view maintained by the authors nor even to attempt a classification of their doctrines.⁷⁴ Of importance in this study is to ascertain how they compare with Story as regards their influence upon the conflict of laws. Of the nineteenth century writers two names stand out in this respect above the rest, and these are Savigny and Mancini.

Savigny, known everywhere as the great German Romanist and the leading figure of the modern historical school, published five years after the appearance of Story's *Commentaries*, the eighth volume of his great treatise on modern Roman law, dealing with the application of law from the standpoint of time and place.⁷⁵ Savigny looked for a scientific foundation of the rules of the conflict of laws, which would enable them to develop on a universal basis, unhampered by the restricting influences of any particular local system of law. This scientific basis Savigny found to rest in the modern world upon the interdependence of sovereign states. According to Savigny, the problem of the conflict of laws does not involve the question whether the statutes of a particular state or country affect persons, things, or acts (as was the view of the statutory jurists), nor is it primarily a question of the limits of the power of a given legislator. In his estimation the question may be

73. The authors appear more or less in chronological order, according to the dates of their publications.

74. See BEALE, *TREATISE ON THE CONFLICT OF LAWS* (1916) 62-113.

75. The full title of the work in English is *PRIVATE INTERNATIONAL LAW — A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME*.

stated thus: "To ascertain for every legal relation . . . that law to which, in its proper nature, it belongs or is subject."⁷⁶ This, he said, may be regarded as "a friendly concession among sovereign states," but "this suffrance must not be regarded as the result of mere generosity or arbitrary will, which would imply that it was also uncertain and temporary," but as "the proper and progressive development of law."⁷⁷ The judge must apply the law of the state or country to which the legal situation before the court belongs, called by Savigny the "seat" of the obligation.

Savigny's treatise met with a most enthusiastic reception, not only in Germany and on the continent in general, but likewise in England, where it has been referred to, until the appearance of the modern English works by Westlake, Dicey, and Foote, more often than any other work except that of Story. Savigny did not try to find a direct solution for the manifold problems in the conflict of laws, but he sought to find a method which would furnish a key to their solution. The method that he gave to the world was hailed as the veritable beginning of the modern science of the conflict of laws, and with it the work of the statutory writers lost on the continent all further influence. Story's *Commentaries* created a new epoch in the history of the conflict of laws, but his work was a practical one, based on the experience of Anglo-American courts. Conditions on the continent were different. The courts did not occupy there the prestige held by them in England, the result being that the continental law was developed by the jurists rather than by the courts. Story's mode of approach was, therefore, foreign to that in vogue on the continent. Moreover, the Anglo-American conflict of laws had grown up along peculiar channels, influenced by feudalistic conceptions and insular notions of the common law, which were antagonistic to those recognized in continental Europe. While the rich storehouse of English and American decisions and the judicial appraisal thereof by a learned and practical-minded judge could not help being appreciated and was in the nature of things drawn upon, Savigny's theoretical work was more in harmony with their mode of thinking. Since its appearance and until the end of the nineteenth century, Savigny's treatise on the conflict of laws may be said to have dominated continental thinking on the subject.

The third leading figure of the nineteenth century in the field

76. SAVIGNY, *op. cit. supra* note 69, at 27.

77. *Id.* at 28.

of the conflict of laws is Mancini. This great Italian statesman occupies a position quite different from that of either Story or Savigny. He wrote neither a great practical work on the conflict of laws of Italy, nor did he launch into the world an epoch-making theoretical treatise. His fame goes back to a lecture delivered by him on January 22, 1851, at the University of Turin on the subject of "Nationality as the Basis of International Law."⁷⁸ In this lecture Mancini propounded a new theory of law, to the effect that law is essentially personal instead of territorial. It is made for a people and not for a territory—for a people whose common consciousness of nationality is derived from the landscape of the country in which they were born, from race, speech, custom, history, law, and religion. Law is territorial only insofar as it is a matter of public order. In the system of Mancini the notion of public policy no longer intervenes by way of exception in the conflict of laws as a limitation upon the application of foreign law, as it still does with Savigny. It constitutes one of the two fundamental principles upon which the rules of the conflict of laws rest. If a given provision of a local law is one of public order, it is territorial and applicable to all within the territory, without reference to their nationality. If it does not fall within this category, it is personal, and the *lex patriae* controls. The conclusion last stated was modified, however, by a third fundamental principle, relating to the autonomy of the parties and the idea of liberty, according to which the law chosen by the parties will control, so far as they are free to choose the law.

The new doctrine announced by Mancini, so contrary to that of Story and Savigny, came at a time of national aspirations and for that reason found a welcome response, not only in Italy but elsewhere. The principle of nationality was adopted by the Italian Civil Code, of 1865, as the law governing capacity, status, and domestic relations, the rights of succession upon death, and to some extent the law governing contracts. In the legislation of other countries the *lex patriae* displaced the *lex domicilii* as regards capacity and status and in other respects. Mancini's views exerted also great influence upon the courts of continental Europe belonging to the Latin group, especially in the matter of "ordre public." Every legislation dealing with the conflict of laws in Europe since the time of Mancini has made nationality the basis of the personal law in its system of the conflict of laws. It is only in the most recent times that a certain reaction has set in among the continental writers

78. DELLA NAZIONALITÀ COME FONDAMENTO DEL DIRITTO DELLI GENTI.

against the views advocated by Mancini, it being recognized today that the law of domicil has a legitimate place alongside that of the *lex patriae*.

In the twentieth century another person has arisen who deserves to be mentioned in connection with Story, Savigny, and Mancini, as one of the great figures in the field of the conflict of laws. This is Dr. Antonio Bustamante, of Havana, Cuba. A distinguished jurist, his title to recognition among the great personalities in the field of the conflict of laws rests upon his authorship of the Pan-American Code of Private International Law,⁷⁹ which was adopted at the Sixth Pan-American Conference at Havana in 1928, and which has been ratified by many of the Latin-American countries.⁸⁰ The scope of the conflict of laws, according to Bustamante, is a two-fold one. It should indicate what foreign laws should be recognized as operative within a given state or country, and in addition it should set out the limits within which, from an international point of view, the legislation of such state or country should be confined. Similarly to the classification suggested by Mancini's doctrine, Bustamante would divide all laws into three classes: (1) those applying to persons by reason of their domicil or nationality and following them even when they go to another country. These he calls personal, or of an internal public order. (2) Those binding alike upon all persons residing within the territory, whether or not they are nationals. These he calls territorial, local, or of an international public order. (3) Those applying only to the expression, interpretation, or presumption of the will of the parties, or of one of them. These he calls voluntary or of a private order. The difficulty with this mode of approach is that it furnishes no solution whenever the countries with which the juridical situation is connected fail to classify their laws in the same manner.⁸¹ It also throws upon the judge of the forum the duty of classifying laws of a foreign country in accordance with the three-fold division above sug-

79. BUSTAMANTE, SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, HAVANA (1928) Final Act, 20 *et seq.*; see also BUSTAMANTE, DERECHO INTERNACIONAL PRIVADO (3 vols. 1931).

80. No agreement could be reached at the Conference regarding whether the law of domicil or that of nationality should determine the personal law. The Convention allows each ratifying state to choose between the two.

81. For example, if two foreigners enter into a legal transaction in Cuba and the local Cuban law applicable to the matter is regarded as personal, that is, as falling within the first class, no solution is furnished by the Pan-American Code if the national law of the parties should deem it territorial, that is, as falling within the second class.

gested, a task which he is scarcely able to undertake successfully.

Story's general theory of the conflict of laws is presented in the first two chapters of his *Commentaries*. According to Story, the laws of a country operate *proprio vigore* only within the limits of their territory. Whatever extraterritorial power they have results from their voluntary recognition, on grounds of comity, by the other states or countries. In thus attributing territorial force to law, Story follows the general maxims formulated by Huber. Story says: "The laws of every state affect, and bind directly all property, whether real or personal, within its territory."⁸² And "no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, . . ."⁸³ "Whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent."⁸⁴

Most continental writers have been severely critical of Story's theory of "comity." As used by the Dutch writers the term "comity" had a political connotation, which appears to leave the application of foreign law to the discretion of the courts, instead of basing it upon a duty to do justice. Story stated, however, expressly, that it rested upon "a sort of moral necessity to do justice."⁸⁵ Nevertheless, no amount of explanation will cause the theory of "comity" to be acceptable to continental jurists, because of the suggestion contained therein that the rules of the conflict of laws have their foundation, not in considerations of law and justice but of self-interest and courtesy to other states. Meili has said of comity that it had prepared a "juridical blind alley"⁸⁶ for our subject, and that it blocked the way to its future development. According to Gutzwiller, a system of the conflict of laws based upon "comity" is "based upon sand."⁸⁷ Bustamante says that comity is based on such ideas as interest, courtesy, and reciprocity, and that "the name of science cannot be given to them, nor even a practical and useful system be based thereon."⁸⁸

82. STORY, *op. cit. supra* note 13, § 18.

83. *Id.* § 20.

84. *Id.* § 23.

85. *Id.* § 35.

86. *Ein Specimen aus der holländischen Schule des internationalen Privatrechts (Ulricus Huber 1686-1694)* (1898) 8 ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT- UND STRAFRECHT 189, 190.

87. *Internationalprivatrecht*, 1 STAMMLER'S DAS GESAMMTE DEUTSCHE RECHT (1931) 1531.

88. 1 TRATADO DE DERECHO INTERNACIONAL PRIVADO (1896) 456; see also 1 BUSTAMANTE, DERECHO INTERNACIONAL PRIVADO (1931) 22.

The objection that "comity" implies self-interest, convenience, and utility is in itself without force, for the positive rules of the conflict of laws of all foreign systems rest upon such considerations. For example, the choice between the law of domicile and that of nationality and the notions of "public policy" are clearly determined by them. Nor would, in the eyes of most continental jurists, the objection to the Anglo-American point of view be removed by the mere elimination of the word "comity" from its juristic terminology. Following Savigny, they insist upon the necessity of some international foundation for the rules of the conflict of laws. They regard the rules of the conflict of laws as imposed by some superior or outside power—be it that of international law, or of a common consciousness which is binding in the nature of things. Between this view and the Anglo-American law there is an irreconcilable gulf. Anglo-American law does not admit the concept of law entertained by the above writers, which has no reference to physical force. It insists, therefore, that in the present organization of the world the rules of the conflict of laws are not enforced by any outside or superior authority, but are voluntarily accepted by each sovereign state. The very fact of sovereignty precludes the notion that foreign law can have any force or validity within the state except with the permission of the territorial sovereign.

Story's views on the subject of comity have been attacked in the United States, so far as they have reference to the laws of the different states of this country. The contention has been made that the courts of one state should be under a constitutional obligation to recognize rights created by the law of a sister state, and that Story's notion of comity has prevented the adoption of this view by the Supreme Court of the United States.⁸⁹ The allegation is that under the comity doctrine the courts of one state have declined to give effect to causes of action that arose in a sister state. The Supreme Court has recognized in the past the power of the courts of the individual states to decline to enforce causes of action of a sister state on grounds of public policy, but it is free at any time to reverse this position by invoking the due process clause or the full faith and credit clause of the Federal Constitution. If a distinction is to be made between the power of courts to enforce causes of action that have arisen in a foreign country and those that have arisen in a sister state, it would seem that the proper way of attaining the end would be by invoking constitutional provisions and not by an attack upon the comity theory in general. So far as the

89. Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656, 657-58.

rules of the conflict of laws are concerned, apart from constitutional obligations, it is perfectly clear today that they are adopted by our courts in the same manner as are rules of domestic law. Since comity in the sense of courtesy to other nations is not a factor entering into the judicial process, it would be well if the use of the term were abandoned.

Serious issue may be taken with Story's territorial theory of Anglo-American law. The assertion that "no state or nation can by its own laws directly affect or bind property out of its own territory, or bind persons not resident therein" is, to say the least, misleading.⁹⁰ "Much of the confusion in Anglo-American legal thinking," says Professor Cook, "goes back to Story's treatise."⁹¹ A detailed criticism, however, of Story's views in this regard would be out of place in a commemorative article on the occasion of the one hundredth anniversary of his *Commentaries*. Many new schools of thought have arisen since the time of Story, and in the light of these changes no general statement made a century ago concerning the nature of sovereignty, law, or rights will bear the test of critical examination today. There are even now great differences of view regarding the most elementary and fundamental notions in the conflict of laws. Continental thought still differs radically from Anglo-American, and no agreement exists among the writers of any country. Other criticisms of Story's treatise, to the effect that it avoids any statement of general principle,⁹² that it contains no attempt at historical development of the subject,⁹³ and that it is "one of the least scientific,"⁹⁴ because of its indiscriminate use of foreign authors, may be ignored likewise, in view of the general objective of this article.

No doubt, the great vogue since the days of Savigny of *a priori* writings on the conflict of laws hid for a time on the continent the true merits of Story's *Commentaries*. In recent years, however, a change has come about in continental thinking, for the exclusive use of the theoretical method has been found insufficient and a more realistic approach in the study of the conflict of laws found to be indispensable. As a result, Story is honored once more as the first and foremost representative of the practical method. One of the leading German writers,

90. See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736, 737; Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368.

91. *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457, 483.

92. BAR, *op. cit. supra* note 66, at 46.

93. *Id.* at 47.

94. HARRISON, *loc. cit. supra* note 2.

speaking of Story's influence upon the development of the conflict of laws, says that through his influence upon Foelix, Savigny, and Bar he has given Europe "a sound and equitable conception of the conflict of laws."⁹⁵ This is the highest praise that could be bestowed upon any author. In the United States and England, Story is revered today as the father of the conflict of laws. In this one hundredth anniversary year of the publication of his *Commentaries*, the rest of the world joins the Anglo-American in rendering homage to the great American jurist, and to acclaim him one of the leading personalities of all time in the field of the conflict of laws.

95. Gutzwiller, 29 RECUEIL DES COURS, ACAD. DE DR. INT. (1929) 341, 351.

8. DEVELOPMENTS IN THE CONFLICT OF LAWS, 1902-1942*

THE writer's interest in the conflict of laws coextends substantially with the life of the *Michigan Law Review*. This may be some excuse for attempting to trace some of the developments in this field in the intervening years. Let us consider first what has happened in this country and thereupon what has occurred in the rest of the world.

DEVELOPMENTS IN THE UNITED STATES

If one compares the place of the conflict of laws in the law school curricula of today with its position at the beginning of the century, one observes a very marked change. Through Professor Beale the conflict of laws became, since 1894, one of the major and most popular courses at the Harvard Law School, and as the influence of that school spread over the country, it carried with it an enthusiastic interest in this subject. Through Professor Beale's influence also one of the first subjects to be restated by the American Law Institute was that of the conflict of laws, with Professor Beale as Reporter. After ten years of unremitting labor the *Restatement* of this subject was brought to a conclusion in 1934. In this *Restatement* we have the most detailed collection of rules of the conflict of laws to be found in any country.¹

Characteristic of the American conflict of laws is that it is applicable both between the different states of this country and between this country and foreign countries; that is, it has both an interstate and an international aspect.² Characteristic of our system of the conflict of laws is likewise that the authority of the individual states to lay down conflicts rules is subject to various limitations imposed by the Constitution of the United States as interpreted by the Supreme Court. Textbooks on the conflict of laws published prior to 1902 scarcely touched upon the constitutional aspects of the subject, except in connection

* (1942) 40 MICHIGAN LAW REVIEW 781.

1. The Conflict of Laws Restatement contains 625 sections. The Code Bustamante (Pan-American Code of Private International Law), covering a wider field, has 437 sections.

2. See Du Bois, "The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions," 17 MINN. L. REV. 361 (1933).

with the jurisdiction of courts and the enforcement of judgments of sister states. Beale's casebook on the conflict of laws followed the same trend. How different the latest edition of the casebook on that subject by Cheatham, Dowling, Goodrich and Griswold! Forty years ago it appeared that the states and their courts were practically free to adopt the rules of the conflict of laws deemed most convenient. During the last twenty-five years the Supreme Court has invoked the full faith and credit clause, the due process clause and other clauses of the United States Constitution in an increasing number of cases to limit the power of the legislatures and courts in this regard, so that the question came to be asked whether the conflict of laws in this country had become a part of constitutional law.³ Late decisions of the Supreme Court would suggest that the Court as now constituted may be disposed to call a halt to the movement alluded to.⁴

From early times the question has been whether our federal courts should follow the rules of the conflict of laws obtaining in the states in which they sit so that there might be uniformity of decision between the federal and state courts in the same state, or whether the federal courts should develop conflict of laws rules of their own so as to secure uniformity between the federal courts of this country. As early as 1842 the case of *Swift v. Tyson*⁵ decided that the federal courts were not bound by the state rules in matters of general law, from which it followed that they were not compelled to follow the conflict of laws rules of any state.⁶ This long-established doctrine was overthrown in 1938,⁷ and it is now the duty of the federal courts to follow the conflict of laws rules of the states in which they sit.⁸ This obligation exists, of course, only to the extent that the

3. Ross, "Has the Conflict of Laws Become a Branch of Constitutional Law?" 15 MINN. L. REV. 161 (1931).

4. See especially *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

5. 16 Pet. (41 U. S.) 1 (1842).

6. Thus, up to 1938 the federal courts required the existence of reciprocity for the enforcement of judgments of foreign courts, *Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139 (1895), whereas the state courts regarded them generally as conclusive. *Johnston v. Compagnie Générale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926); *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N. Y. S. 284 (1926), *affd.* 246 N. Y. 603, 159 N. E. 669 (1927).

7. *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938).

8. *Sampson v. Channell* (C. C. A. 1st, 1940) 110 F. (2) 754, cert. den. 310 U. S. 650, 60 S. Ct. 1099 (1941); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020 (1941); *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

state has the power to adopt its own rules of the conflict of laws, free from any constitutional restraint.

In the matter of the jurisdiction of courts, our law has approached during the last forty years to a certain extent the continental point of view. On the continent of Europe and in Latin America a person may be sued upon any personal cause of action at his domicile and in other places with which the transaction is deemed to have a sufficient connection. In this country there were recognized forty years ago only two general bases of jurisdiction in personal actions, resting on personal service or consent. A third basis—that of domicile—was adopted in some states by statute, which conferred power upon the courts to enter a personal judgment upon constructive service against a defendant who was domiciled in the state, but in some states the validity of such legislation was challenged by the courts.⁹ The Supreme Court of the United States did not pass upon the question until 1940 when it sustained the power of the legislatures to confer such jurisdiction.¹⁰

The rapid increase in business carried on by foreign corporations and nonresident individuals early induced the legislatures of the various states to confer jurisdiction upon their courts over causes of action arising out of such business. Forty years ago our courts still relied on the consent theory to sustain such legislation with respect to foreign corporations. Since then, and especially since the decision of *International Harvester Company v. Kentucky*¹¹ the consent theory proved insufficient, whereupon the *presence* theory came into being.¹² This theory in turn does not solve the problem.¹³ The view is finding more and more acceptance today that, where contract or tort obligations are incurred in connection with the business of foreign corporations or nonresident individuals, it is only fair that the parties injured should be able to obtain redress through the courts of the state where the business is carried on instead of

9. See *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 P. 345 (1896); *Moss v. Fitch*, 212 Mo. 484, 111 S. W. 475 (1908); *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494 (1911); *McCormick v. Blaine*, 345 Ill. 461, 178 N. E. 195 (1931).

10. *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339 (1940). In *McDonald v. Mabie*, 243 U. S. 90, 37 S. Ct. 343 (1917), the case went off on the due process clause, the best practicable mode of constructive service not having been used.

11. 234 U. S. 579, 34 S. Ct. 944 (1914).

12. See *International Harvester Co. v. Ky.*, 234 U. S. 579, 34 S. Ct. 944 (1914); *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233 (1918).

13. See remarks of Judge Learned Hand in *Hutchinson v. Chase & Gilbert*, (C. C. A. 2d, 1930) 45 F. (2d) 139.

being able to bring suit only in the home state of the foreign corporation or nonresident.¹⁴

As long as jurisdiction over foreign corporations was predicated upon the theory of implied consent, the privilege and immunities clause seemed to present an insurmountable obstacle to the exercise of jurisdiction over nonresident citizens, for the reason that whereas foreign corporations could be excluded from doing business in the state or admitted upon terms, citizens of other states could not.¹⁵ This difficulty disappears if the latest theory of jurisdiction referred to above is recognized.

As regards damage caused by automobiles of nonresidents, it is now settled by the decisions of the Supreme Court of the United States that a state may confer jurisdiction upon its courts by authorizing service upon some state official as the representative of the nonresident owner and requiring that the owner be notified of the pendency of the suit, generally by registered mail.¹⁶ The police power of the states over their roads has been invoked as a legal justification for the exercise of this exceptional mode of jurisdiction. The *Restatement of the Conflict of Laws*¹⁷ would go beyond and recognize the power of states to assume jurisdiction over causes of action arising out of any act done in the state, provided some reasonable mode of constructive service be required. The recognition of such a formula would extend the jurisdiction of our courts even beyond the accepted theories in continental and Latin-American countries. The Supreme Court of the United States has not as yet approved such a broad doctrine.

Jurisdiction in rem over interests in land presents no serious problem in the conflict of laws. With respect to chattels, difficulties arise when they are brought into a state without the owner's consent¹⁸ or where the chattel is represented by a negotiable bill of lading or warehouse receipt which is in another state.¹⁹ No final conclusions have been reached by our

14. The troublesome question as to what constitutes doing "business" and the further question whether a corporation conducting a continuous business in a state should not, upon proper notice, be subject to suit with respect to causes of action arising out of foreign transactions still remain. See *Hutchinson v. Chase & Gilbert*, (C. C. A. 2d, 1930) 45 F. (2d) 139.

15. See *Flexner v. Farson*, 248 U. S. 289, 39 S. Ct. 97 (1918).

16. *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632 (1927); *Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259 (1928).

17. Sec. 84 (1934).

18. See *CONFLICT OF LAWS RESTATEMENT*, §§ 102, 103, and caveat (1934).

19. *Heldendall*, "The Res In Transitu and Similar Problems in the Conflict of Laws," 17 CAN. B. REV. 7, 105 (1939).

courts in these matters. As regards intangibles, Professor Beale has contended that in the nature of things jurisdiction in rem is impossible.²⁰ Courts and legislatures have not taken this view, however, and have assumed jurisdiction under varying circumstances. The matter was brought before the Supreme Court of the United States in 1905 in a case where the local legislature allowed the garnishment of a debt owed by a nonresident debtor, which was neither contracted nor payable in the state.²¹ The Supreme Court allowed the exercise of jurisdiction, provided the principal debtor was suable in the state, and stated that the garnishee could set up the garnishment proceedings and payment thereunder as a defense in a suit by his creditor only if he had notified him of the pendency of garnishment proceedings or if his creditor had otherwise learned of the proceedings in time to put up any defense.

Where the debt or other intangible interest is represented by a note, bill or stock certificate, the question has been raised whether the document can be proceeded against in rem on the ground that it has incorporated the chose in action. A considerable number of decisions have been rendered on the point during the last forty years, but there is still much confusion in our law on the subject.²² There is some trend in favor of allowing such a proceeding in the state in which the certificate is found.

Some new developments have taken place since 1900 in the enforcement of judgments of sister states. For example, it has become settled that a state may not decline to enforce such judgments on the ground of public policy.²³ The Supreme Court of the United States has held likewise that tax judgments, like any other judgments for the payment of money,²⁴ are entitled to full faith and credit. A most striking development has been in the direction of extending the doctrine of *res judicata*. Until recently the defense of lack of jurisdiction was available in a suit upon the judgment of a sister state. This defense was cut off by the Supreme Court, however, in 1931 with respect to jurisdiction over the person,²⁵ and still more recently in various

20. Beale, "The Exercise of Jurisdiction in *Rem* to Compel Payment of a Debt," 27 HARV. L. REV. 107 (1913).

21. See *Harris v. Balk*, 198 U. S. 215, 25 S. Ct. 625 (1905).

22. See Andrews, "Situs of Intangibles in Suits against Nonresident Claimants," 49 YALE L. J. 241 (1939).

23. *Fauntleroy v. Lum*, 210 U. S. 230, 28 S. Ct. 641 (1908); *Roche v. McDonald*, 275 U. S. 449, 48 S. Ct. 142 (1927).

24. *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 S. Ct. 229 (1935).

25. *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522, 51 S. Ct. 517 (1931).

cases involving jurisdiction over the subject matter, where the defendant had litigated the question of jurisdiction in the lower court.²⁶

Disputes regarding the status of foreign equitable decrees for the payment of money were set at rest early in this country by statutes which placed them on the same footing with judgments at law.²⁷ Whether an equitable decree for the doing of some act other than the payment of money creates an obligation which is entitled to full faith and credit, or if not, should be enforced on principles of the conflict of laws, or whether it constitutes merely a conclusive determination of the equities of the case which the other courts must respect, is not yet finally determined.²⁸

Arbitration agreements have been regarded in this country as valid but unenforceable, that is revocable at any time before an award was rendered. The revocability rule was first changed in New York in 1920 by statute and thereupon in other states. Congress enacted the United States Arbitration Act, in force since 1926, which is applicable to suits arising in admiralty and in foreign and interstate commerce, except contracts of employment. The legislation with respect to arbitration is so recent that no major developments from the standpoint of the conflict of laws can as yet be recorded. The greatest contrast between our law and that of all other countries consists in the fact that according to our courts the enforcement of foreign arbitration agreements relates to procedure instead of to the substantive rights of the parties.²⁹

Courts have declined to enforce the laws of foreign states or countries normally applicable when they were sufficiently distasteful to them. In such a case they are wont to say that the enforcement of the foreign law is contrary to the public policy of the forum. Writing in 1918,³⁰ Judge Beach contended that such a doctrine had no place between the states of this country. Although the tendency to narrow the public policy doctrine has

26. *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3 (1938); *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 60 S. Ct. 44 (1939).

27. See *Post v. Neafie*, 3 Caines (N. Y.) 22 (1805).

28. See *Fall v. Eastin*, 215 U. S. 1, 30 S. Ct. 3 (1909), especially concurring opinion by Justice Holmes, and CONFLICT OF LAWS RESTATEMENT, §§ 447, 450 (1934).

29. *Meacham v. Jamestown, F. & C. R. Co.*, 211 N. Y. 346, 105 N. E. 653 (1914); Lorenzen, "Commercial Arbitration—International and Interstate Aspects," 43 *YALE L. J.* 716 (1934).

30. Beach, "Uniform Interstate Enforcement of Vested Rights," 27 *YALE L. J.* 656 (1918).

continued during the last forty years,³¹ it has still the sanction of the Supreme Court of the United States.³² But what is the legal effect of the application of the public policy doctrine? May the plaintiff who is denied recovery because the enforcement of a claim is deemed to be against the public policy of the forum sue the defendant again in some other state, on the ground that the first judgment affected merely matters of procedure and for that reason is not *res judicata*? Justice Brandeis has given an affirmative answer to this question,³³ but there is authority to the contrary.³⁴ So far as the public policy doctrine can be invoked against a defendant, by excluding his defense,³⁵ he is clearly out of luck, for the judgment against him is conclusive. To what extent the full faith and credit to be accorded to the public acts of sister states will be held to restrict the power of the courts of the forum to invoke their public policy doctrine in cases of this sort cannot be stated with any degree of assurance.

Until 1910 courts and writers in this country were unaware that differences in the conflict of laws rules of two countries raised a problem which had been debated a great deal on the continent, viz. whether the conflict of laws rules of the forum should be deemed to refer to the law of the foreign country inclusive of its conflict of laws rules or exclusive of such rules.³⁶ The problem is technically known as that of *renvoi*. If the courts apply foreign conflict of laws rules, they are said to adopt the *renvoi*.³⁷ We have no decisions as yet clearly supporting the *renvoi* doctrine.³⁸ Griswold³⁹ would justify it in the interest of uniformity if the courts of the forum would decide the case in the same manner as the courts of the foreign coun-

31. *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 120 N. E. 198 (1918).

32. *Union Trust Co. v. Grosman*, 245 U. S. 412, 38 S. Ct. 147 (1918); *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

33. *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145 at 160, 52 S. Ct. 571 (1932).

34. *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172 (1912).

35. See *Fox v. Postal Telegraph Cable Co.*, 138 Wis. 648, 120 N. W. 399 (1909).

36. See Lorenzen, "The *Renvoi* Theory and the Application of Foreign Law," 10 COL. L. REV. 190, 327 (1910).

37. It may lead either to the application of the law of the forum (case of remission) or to that of another state or country (case of transmission).

38. The only decision in this country in which the matter is fully discussed is that of *In re Tallmadge*, 109 Misc. 696, 181 N. Y. S. 336 (1919), decided by the Surrogates Court of New York County. The court reached the conclusion that the *renvoi* doctrine had no place in our law.

39. Griswold, "Renvoi Revisited," 51 HARV. L. REV. 1165 (1938).

try. Such uniformity would be achieved, however, only between countries having the same conflict of laws rule and then only if the courts of the foreign country would reject Griswold's version of the *renvoi* doctrine.⁴⁰

Although the courts in question have the same rules of the conflict of laws, different meanings may be attached thereto. For example, both may apply the law of domicile in the case of intestate succession regarding movables but their notions of domicile may vary. Again, both may say that the law of the place where the contract is made governs its validity and yet reach different conclusions when the contract is made by correspondence as regards the place of contracting. This problem is part of what is technically known as the qualification, classification or characterization problem. The first article on this subject written in English appeared in 1920.⁴¹ On the continent the subject has aroused the interest of a large number of jurists who have enlarged its scope to such an extent as to cover practically the entire subject of the conflict of laws. Under such circumstances no useful statement of a general character can be made regarding it. In a second article I attempted to limit the problem so as to keep it within proper bounds.⁴² Professor Cook quotes a portion of my article and says that the arguments there used "make no sense in any usable terminology" of legal logic.⁴³ I agree, but it ought to have been apparent that the arguments advanced by me were not intended to express my own point of view on the subject of substance and procedure⁴⁴

40. If A, a citizen of State X, dies domiciled in State Y and State X distributes personal property upon death in accordance with the law of domicile and State Y in accordance with the law of nationality, under the Griswold formula uniformity would actually be obtained only with respect to countries adopting the law of domicile in the distribution of personal property upon death. They would all distribute the property as the courts of Y would do. Courts distributing the property in accordance with the national law of the decedent would distribute it as the courts of State X would do. Such uniformity in each group could be achieved only if the courts of the foreign country whose law is applicable reject the Griswold formula and use the *renvoi* as an excuse for applying the law of the forum. If they were to accept the Griswold formula, they would fall into circular reasoning from which there would be no logical escape,—the courts of X would have to distribute the property as it would be distributed by the courts of State Y and the courts of State Y would have to distribute it as the courts of State X.

41. Lorenzen, "The Theory of Qualifications and the Conflict of Laws," 20 *COL. L. REV.* 247 (1920).

42. Lorenzen, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws," 50 *YALE L. J.* 743 (1941).

43. Cook, "'Characterization' in the Conflict of Laws," 51 *YALE L. J.* 191 at 198 (1941).

44. See Lorenzen, "The Statute of Frauds and the Conflict of Laws," 32 *YALE L. J.* 311 (1923).

but the kind of reasoning usually indulged in by our courts.

Besides the *renvoi* theory and the qualification problem, the notion of fraud upon the law has aroused considerable interest on the continent in modern times, especially in France. In this country there are isolated instances in which courts have dealt with the problem, especially in the case of marriage and divorce, but no attempt has been made to develop general theories regarding it.⁴⁵

The courts of all countries will enforce only foreign substantive rights and not foreign rules of procedure. This is in accordance with the necessity of the situation, for the courts of one state cannot use the legal machinery of the state governing the right in question. In the nature of things courts enforce all causes of action only in accordance with the local legal machinery. Matters of procedure, pleading and rules of evidence are, therefore, naturally governed by the law of the forum, although they may affect the decision in a particular case. Anglo-American courts, however, have not drawn the line as indicated above and have called matters procedural in the conflict of laws because they had been so regarded for other purposes. The line between substance and procedure is a flexible one and can be drawn in different places in accordance with the objectives in view, so that the label "procedure" attached to a matter in other branches of the law is not determinative of the question in the conflict of laws.⁴⁶ In recent years our courts have become somewhat aware of this fact, especially with respect to the statute of frauds.⁴⁷

Anglo-American law determines various questions in the conflict of laws with reference to the law of domicile. In most countries of the world a married woman takes at the time of marriage the domicile of her husband and her domicile follows that of the husband throughout the marriage.⁴⁸ This rule was modified, however, in the United States by the middle of the last century in the matter of divorce, to the extent of its being recognized that a married woman who was justified in living apart from her husband could acquire a separate domicile for the purpose of securing a divorce.⁴⁹ The unitary concept of domicile as between husband and wife having once been broken, it was inevitable that a married woman should be allowed to

45. See CHEATHAM, DOWLING, GOODRICH and GRISWOLD, *CASES AND MATERIALS ON THE CONFLICT OF LAWS*, 2d ed., 582-584 (1941).

46. Cook, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 *YALE L. J.* 333 (1933).

47. See *Lams v. F. H. Smith Co.*, 6 W. W. Harr. (36 Del.) 477, 178 A. 651 (1935).

48. See *Attorney-General for Alberta v. Cook*, [1926] A. C. 444.

49. *Cheever v. Wilson*, 9 Wall. (76 U. S.) 108 (1869).

acquire a separate domicile for other purposes than divorce. Thus it was held by the Supreme Court of the United States in 1915⁵⁰ that she could do so for the purpose of bringing an action for damages against her husband in a federal court. Some courts took the position that as long as the marriage ties were in fact broken a married woman could have a separate domicile without respect to whether or not she was the guilty party in breaking up the home.⁵¹ One or two recent cases have taken the most advanced position to the effect that a wife may retain her old domicile by agreement with her husband.⁵²

At common law legitimate children took the domicile of their father. This rule has been modified by modern statutes which confer upon the mother equal rights of guardianship and by the developments in our law regarding the capacity of a married woman to acquire a separate domicile from that of her husband. Children living with their mother are frequently held, therefore, to take the domicile of their mother.⁵³ They will continue to do so after the mother's remarriage, provided they continue to live with their mother.⁵⁴

The dogma, deeply rooted in Anglo-American law, that a person can have but one domicile has been challenged in recent times and it is said that a person may have different domiciles for different purposes. A troublesome question has arisen in recent years with regard to the inheritance taxation of intangible property when two or more states claimed the decedent to be domiciled in their state. Except in one case,⁵⁵ in which four states imposed an inheritance tax, the total amount of which would consume the entire estate, the Supreme Court has declined to interfere.⁵⁶ The only relief in sight at present seems to be the enactment of state legislation providing for the voluntary submission of controversies of this sort to arbitration.⁵⁷

The law was settled in this country at the beginning of the century that the law of the state in which a tort was committed,

50. *Williamson v. Osenton*, 232 U. S. 619, 34 S. Ct. 442 (1913).

51. *Saperstone v. Saperstone*, 73 Misc. 631, 131 N. Y. S. 241 (1911); *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806 (1889).

52. *Commonwealth v. Rutherford*, 160 Va. 524, 169 S. E. 909 (1933).

53. *CONFLICT OF LAWS RESTATEMENT*, § 32 (1934).

54. *Id.*, § 38, comment d.

55. *Texas v. Florida*, 306 U. S. 398, 59 S. Ct. 563, 830 (1939).

56. See *In re Dorrance's Estate*, 309 Pa. 151, 163 A. 303 (1932); 115 N. J. Eq. 268, 170 A. 601 (1934), cert. den. 298 U. S. 678, 56 S. Ct. 949 (1936).

57. Harper, "Final Determination of Domicil in the United States," 19 PA. B. A. Q. 213 (1934); reprinted in 9 IND. L. J. 586 (1934); 28 NAT. TAX ASSN. CONF. PROC. 201 (1935); Knapp, "Solutions of the Double Domicile Problem—History and Prospects," 15 CONN. B. J. 251 (1941).

that is, where the injury or harm was done, determined the substantive rights of the parties.⁵⁸ In connection with wrongful death statutes the question has been debated whether the place of impact or that of the death should control. The law is now settled in favor of the former rule.⁵⁹ Early in the century many courts professed to enforce claims arising under foreign wrongful death statutes only if there was a substantially similar statute at the forum. This similarity test has been abandoned today in practically all the states.⁶⁰

The advent of the automobile has raised the problem whether the owner shall be held in accordance with the law of the place of the injury for damages caused by his auto when driven by a servant, a friend or a member of the family in a state other than the one in which the owner lived. In *Young v. Masci*⁶¹ the Supreme Court of the United States held that the owner should be liable if the auto was in the state in which the injury occurred with his express or implied consent. Judge Learned Hand has interpreted *Young v. Masci* as holding that the owner would not be liable if the auto was taken into the other state without his consent.⁶² It would not be surprising, however, if the Supreme Court should hold that when an owner entrusts his auto to someone he takes the risk of its being taken to a state not contemplated by him, so as to be liable even in that event in accordance with the *lex loci delicti*.

Workmen's compensation acts were unknown forty years ago. Now they exist in all states except Mississippi. At first the question was asked whether the legislation belonged to the law of torts or to the law of contracts. Today it is admitted that the application of these acts should not be determined on such a technical basis and that they should be construed to achieve the social purpose for which they were designed.⁶³ The law has not crystallized as yet as to the means best calculated to attain this end. The tort theory has been generally abandoned. The so-called contract theory is numerically still prevailing, but other

58. In England an action will lie only if the facts constitute a tort under English law and the conduct was justifiable under the foreign law. *Machado v. Fontes*, [1897] 2 Q. B. 231, 66 L. J. (Q. B.) 542 (Court of Appeal).

59. See *Vancouver Steamship Co. v. Rice*, 288 U. S. 445, 53 S. Ct. 420 (1933).

60. See *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 120 N. E. 198 (1918).

61. 289 U. S. 253, 53 S. Ct. 599 (1933).

62. *Scheer v. Rockne Motors Corp.*, (C. C. A. 2d, 1934) 68 F. (2d) 942.

63. *Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021 (1920); *Ocean Accident & Guarantee Corp. v. Industrial Commission of Arizona*, 32 Ariz. 275, 257 P. 644 (1927).

theories, such as that of the localization of business⁶⁴ or the localization of employment,⁶⁵ have come to the front. The question under what circumstances the workmen's compensation act of one state is entitled to full faith and credit by the courts of another state came before the Supreme Court of the United States in 1932.⁶⁶ The Court held that under the facts of the case the Vermont act was entitled to full faith and credit and that New Hampshire could not apply its own act, notwithstanding the fact that the injury had been received in New Hampshire. Since that time the Supreme Court has taken the position that any state whose public policy is sufficiently involved has the power to apply its own act.⁶⁷

In some states the employee who has accepted compensation under the workmen's compensation act may sue a third party who has caused the injury, the employer being subrogated to the extent of his payment. In others the employee is deprived of such cause of action but the employer may sue the third party in the name of the employee to recover to the extent of his outlay. Owing to such differences in legislation, troublesome questions of subrogation have arisen which are not as yet worked out by the courts with any degree of clarity.⁶⁸

The subject of contracts has not advanced much beyond the state in which it was forty years ago. The early cases, in agreement with Story,⁶⁹ held that the law of the *lex loci contractus* controlled except when the contract was to be performed elsewhere, when, in accordance with the presumed intention of the parties, the law of the place of performance would control. Professor Beale⁷⁰ has regarded this as an importation of continental ideas inconsistent with the principle of territoriality adopted by the common law, according to which the state in which a contract is technically made has exclusive power to

64. *State ex rel. Chambers v. District Court of Hennepin County*, 139 Minn. 205, 166 N. W. 185 (1918).

65. *Cameron v. Ellis Construction Co.*, 252 N. Y. 394, 169 N. E. 622 (1930).

66. *Bradford Electric Light Co. v. Chapper*, 286 U. S. 145, 52 S. Ct. 571 (1932).

67. *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U. S. 532, 55 S. Ct. 518 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 306 U. S. 493, 59 S. Ct. 629 (1939).

68. See Dwan, "Workmen's Compensation and the Conflict of Laws," 11 MINN. L. REV. 329 (1927); Dwan, "Workmen's Compensation and the Conflict of Laws—The Restatement and Other Recent Developments," 20 MINN. L. REV. 19 (1935).

69. CONFLICT OF LAWS RESTATEMENT, § 242 (1934).

70. Beale, "What Law Governs the Validity of a Contract," 23 HARV. L. REV. 1, 79 (1909), 194, 260 at 267–268, 270 (1910); 2 BEALE, CONFLICT OF LAWS, 1078 et seq. (1935).

attach legal consequences to the operative facts. As Reporter of the Conflict of Laws for the American Law Institute, Professor Beale succeeded in making his views the basis of the *Restatement*.⁷¹ This is most unfortunate. How can the manifold legal relations affecting the nature and validity of contracts of greatly varying types be brought within such a simple formula and be made dependent upon the frequently accidental circumstance regarding the last act which is deemed to make the agreement a binding contract? The Supreme Court of the United States has been of no aid in the solution of this problem. In some cases it appears to follow Professor Beale's point of view⁷² and in others, that of Story.⁷³ In usury cases, in agreement with most state decisions, it allows the parties to contract in good faith with reference to either the law of the place of making or the law of the place of performance.⁷⁴ There is no valid reason why this liberal principle should not be applied generally to the validity of contracts, at least where only conceptual differences are involved. As to matters not involving the validity of contracts, the parties ought to be allowed to choose the law of any state, although it has no connection with the operative facts of the case.

For a while it seemed as if the Supreme Court of the United States would impose the Beale point of view as a matter of constitutional law in certain types of contracts, especially in matters of insurance,⁷⁵ but in the light of its latest pronouncements this is no longer clear. It seems that the law of the forum will be allowed to determine for itself where the contract is made and whether the law of some other state or country is applicable and, if it has a legitimate interest in the matter, it may decline to give effect to the foreign law on grounds of public policy.⁷⁶

Prior to 1906, the year in which the Carmack Amendment to the Interstate Commerce Act brought interstate shipments under federal control, conflicts questions regarding the validity

71. See *CONFLICT OF LAWS RESTATEMENT*, § 332 (1934).

72. See *Scudder v. Union National Bank of Chicago*, 91 U. S. 406 (1875).

73. *Hall v. Cordell*, 142 U. S. 116, 12 S. Ct. 154 (1891); *Pritchard v. Norton*, 106 U. S. 124, 1 S. Ct. 102 (1882).

74. *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403, 47 S. Ct. 626 (1927).

75. See *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, 38 S. Ct. 337 (1918); *Mutual Life Ins. Co. v. Liebing*, 259 U. S. 209, 42 S. Ct. 467 (1922); *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 45 S. Ct. 129 (1924); *Home Ins. Co. v. Dick*, 281 U. S. 397, 50 S. Ct. 338 (1930); *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634 (1934); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 57 S. Ct. 129 (1936).

76. See *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

of stipulations limiting the liability of carriers came frequently before our courts. Similar questions arose also with regard to contracts made by telegraph companies prior to 1910 when an amendment to the Interstate Commerce Act subjected such contracts to Federal law if during the course of transmission a state line was crossed. Such stipulations against negligence were regarded as valid in some states and as invalid in others. If valid by the proper law, the courts of the forum might decline to give effect to such stipulations on grounds of public policy, at least where the contract was to be in part performed in the state of the forum or was breached there.⁷⁷

The Harter Act in 1893 eliminated such problems with regard to maritime contracts of carriage by subjecting them to uniform federal legislation. This act was held inapplicable to contracts of passengers and their baggage and consequently with respect to them the above conflicts questions still remain.⁷⁸

The political and economic upheavals following the First World War brought along in their train a multitude of novel questions in the conflict of laws, such as fluctuating exchange,⁷⁹ currency restrictions⁸⁰ and moratory⁸¹ or confiscatory legislation,⁸² some of which have been difficult to deal with on the basis of the traditional rules of the conflict of laws.

Rights in land have been subject in Anglo-American law since the earliest times to the law of the situs. As regards covenants in a deed and especially title covenants, there has existed considerable confusion which persists to the present day. From a realistic approach to the subject it would seem that title covenants, whether running with the land or not, should be governed by the law governing the title, that is the situs of the land.⁸³ Executory contracts relating to land are governed, of course, by the rules of the conflict of laws applicable to con-

77. See *Ocean Steam Navigation Co. v. Corcoran*, (C. C. A. 2d, 1925) 9 F. (2d) 724.

78. *The Kensington*, 183 U. S. 263, 22 S. Ct. 102 (1901); *La Bourgogne*, (C. C. A. 2d, 1906) 144 F. 781, *affd.* 210 U. S. 95, 28 S. Ct. 664 (1908).

79. See *Hicks v. Guinness*, 269 U. S. 71, 46 S. Ct. 46 (1925); *Deutsche Bank Filiale Nurenberg v. Humphrey*, 272 U. S. 517, 47 S. Ct. 163 (1926); LORENZEN, *CASES AND MATERIALS ON CONFLICT OF LAWS*, 4th ed., 499-500 and note (1937).

80. *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, (D. C. N. Y. 1936) 15 F. Supp. 927.

81. *Bailey and Rice*, "The Extraterritorial Effect of the New York Mortgage Moratorium," 20 *CORN. L. Q.* 315 (1935); 36 *COL. L. REV.* 487 (1936); 40 *COL. L. REV.* 867 (1940).

82. *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71, 193 N. E. 897 (1934); see LORENZEN, *CASES AND MATERIALS ON THE CONFLICT OF LAWS*, 4th ed., 583-584, note (1937).

83. See 9 *CAL. L. REV.* 234 (1921).

tracts, but the law governing such contracts is as much in doubt today as it was forty years ago.⁸⁴

The law governing rights of property in chattels has been expressed for centuries by the maxim *mobilia personam sequuntur*, according to which movable property is deemed to follow the person of the owner and governed by the law of his domicile. In modern times personal property is frequently located permanently in a state other than that of the domicile of the owner and for that reason the claims of the law of the situs have asserted themselves more and more. By the beginning of the century it was held that the rights of third parties in chattels should be determined on the basis of their actual situs at the time of the transaction.⁸⁵ Today it is felt that property rights in chattels should be controlled by the law of the situs even between the parties.⁸⁶ Where the chattel has been removed to another state without the owner's consent and the owner has not been negligent in not removing the same after knowledge of its presence there, the law is still unsettled as to whether the rights of the owner can be lawfully divested by the law of the situs.⁸⁷ As title will pass in Anglo-American law as the result of mere agreement, there is generally no occasion to draw a sharp distinction between the contract and property aspects of the subject, and in the conflict of laws our courts have sometimes applied contract rules when property rights were involved, which should have been referred to the law of the situs.⁸⁸ In the interest of greater simplicity, the law of domicile is still retained in determining rights in chattels in certain branches of the law, viz. in the matter of matrimonial property⁸⁹ and in the law of wills and intestate succession.⁹⁰

Questions involving the power of states to tax have come before the Supreme Court with ever-increasing frequency during the last forty years. In accordance with the maxim *mobilia personam sequuntur*, movable property was held to be taxable at the domicile of the owner. This rule was abandoned, however, by the Supreme Court with respect to chattels in 1905,⁹¹

84. See *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737 (1897); *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58 (1901); *Meylink v. Rhea*, 123 Iowa 310, 98 N. W. 779 (1904); *Tillotson v. Prichard*, 60 Vt. 94, 14 A. 302 (1888).

85. See MINOR, CONFLICT OF LAWS, § 129 (1901).

86. See CONFLICT OF LAWS RESTATEMENT, § 258 (1934).

87. See *id.*, § 49, caveat.

88. See *Jewett, Inc. v. Keystone Drilling Co.*, 282 Mass. 469, 185 N. E. 369 (1933).

89. CONFLICT OF LAWS RESTATEMENT, § 289 (1934).

90. *Id.*, § 306 (wills); § 303 (distribution).

91. *Union Refrigeration Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

when it held that a property tax on chattels could be levied only by the state in which they had their actual situs. Twenty years later the same doctrine was applied by the Supreme Court to inheritance taxation.⁹² As regards intangibles, including notes, bonds and stock certificates, the Supreme Court for a time tended to support the view that only the state of the decedent's domicile could impose an inheritance tax,⁹³ but during the last few years the Supreme Court has receded from its former position.⁹⁴

Marriage, which is based upon contract, creates a status. As questions of status are said to be governed in Anglo-American law by the law of the domicile of the parties, it would follow that the law of the domicile of each party should determine whether the status has been created. In this country, however, it has been customary for persons who cannot get married under the law of their respective domiciles to go to a state where they can get married, and to return immediately after the marriage. Our courts have gone very far in sanctioning such evasions by looking at marriage from the contract point of view and therefore holding that the law of the place of celebration controls. In certain types of cases in which local feelings were involved the courts of the domicile of the parties whose law had been evaded have held such marriages to be invalid on grounds of public policy,⁹⁵ but they would be valid in all other states.⁹⁶ Attempts have been made to check such evasion by legislation, notably in the Uniform Marriage Evasion Act,⁹⁷ but these legislative efforts have met with little success.

92. *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603 (1925). See also *City Bank Farmers' Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29 (1934). The question whether a tax might be levied at the business situs was reserved.

93. *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930); *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932).

94. See *Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900 (1939); *Graves v. Elliott*, 307 U. S. 383, 59 S. Ct. 913 (1939); *Stewart v. Pennsylvania*, 312 U. S. 649, 61 S. Ct. 445 (1941).

95. See *Johnson v. Johnson*, 57 Wash. 89, 106 P. 500 (1910); *In re Stull's Estate*, 183 Pa. 625, 39 A. 16 (1898).

96. *Hall v. Industrial Commission*, 165 Wis. 364, 162 N. W. 312 (1917), held that a marriage contracted in evasion of the Illinois law and valid in the state in which it was celebrated was invalid in Wisconsin, on the specific ground that Wisconsin had similar legislation to that of Illinois against evasion and under such circumstances felt it to be its duty to support the policy of the sister state. The court recognized that it was going a step further than that of any case brought to its attention.

97. The Uniform Marriage Evasion Act has been adopted in only five states (Illinois, Louisiana, Massachusetts, Vermont and Wisconsin).

The *Restatement of the Conflict of Laws* has tried to fit our law into the status theory of marriage by providing that where a marriage will not be recognized by the law of the domicile of either party it shall be regarded as void everywhere.⁹⁸

Evasion of the law of the matrimonial domicile has reached vast proportions in recent years in matters of divorce. With the recognition of the wife's capacity to acquire a separate domicile for purposes of divorce, both spouses were enabled to establish their domicile in a state having the most liberal divorce laws and obtain a divorce there on grounds recognized by the law of the forum. Although vigorous attempts have been made to check the migratory divorce evil by legislation, nothing has been accomplished, the Uniform Annulment of Marriage and Divorce Act having been adopted in only three states.⁹⁹ Most of the courts¹⁰⁰ still maintain that for the recognition of a foreign divorce decree the court granting the same must have had jurisdiction over the subject matter, i.e., the status, which requires domicile. In recent years collateral attack upon foreign divorces, admittedly void because of the absence of domicile, has been unsuccessful in many cases because it was deemed inequitable for the attacking party to raise the issue.¹⁰¹ According to this doctrine, the party invoking the jurisdiction of the court may not later deny its jurisdiction, nor, according to some decisions, may the libellee appearing in the suit or who subsequently remarries.¹⁰²

When the parties have tried the issue of domicile, the finding is binding upon all courts as *res judicata*.¹⁰³ Divorces rendered by courts of sister states are entitled to full faith and credit if both spouses were domiciled in the state, or their last matrimonial domicile was in the state,¹⁰⁴ or if the libellant was domiciled in the state and the libellee was personally before the

98. CONFLICT OF LAWS RESTATEMENT, § 132 (1934).

99. In Delaware, New Jersey and Wisconsin.

100. Howe, "The Recognition of Foreign Divorce Decrees in New York State," 40 COL. L. REV. 373 (1940), contends that the New York courts have never committed themselves to the status theory of divorce. This accounts for the fact that they have recognized foreign divorces although neither spouse had a domicile in the state where both parties were before the court. Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923); Glaser v. Glaser, 276 N. Y. 296, 12 N. E. (2d) 305 (1938).

101. See Harper, "The Validity of Void Divorces," 79 UNIV. PA. L. REV. 158 (1930); Harper, "The Myth of the Void Divorce," 2 LAW & CONTEMP. PROB. 335 (1935).

102. For a more detailed statement, see LORENZEN, CASES AND MATERIALS ON CONFLICT OF LAWS, 4th ed., 783-784 (1937).

103. Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3 (1938).

104. Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544 (1901).

court. In other cases the courts of the different states are free to recognize the foreign decree or not.¹⁰⁵ The *Restatement*,¹⁰⁶ following Beale,¹⁰⁷ attempts to give a new interpretation to the decision of the Supreme Court of the United States in the *Haddock* case and to restrict the voluntary recognition of the foreign decree by the individual states in the same manner. The apparent simplification of the law of divorce suggested by the new formulation would seem, however, to be an illusion, in view of the fact that it makes fault a jurisdictional issue which would lead to greater diversity of decisions than that existing at the present time.¹⁰⁸

The loosening of marriage ties during the last forty years, resulting in an ever-increasing number of divorces, has created new problems also regarding alimony and the custody of children. As regards alimony decrees, it is now settled that they are entitled to full faith and credit as final judgments, provided the amount accrued cannot be changed by the court rendering the decree.¹⁰⁹ In the past alimony has been associated with divorce proceedings. However, the fact that today a husband may obtain, without knowledge of the wife, a divorce which will be recognized in many states has compelled the courts to dissociate divorce and alimony and to allow the divorced wife under certain circumstances to bring an independent suit for alimony.¹¹⁰

The jurisdiction of courts to award the custody of children is still based upon two antagonistic principles. One is that jurisdiction to award the custody of children exists at their domicile¹¹¹ and the other, that a court having jurisdiction to award the custody of a child retains jurisdiction to modify its award

105. See *Haddock v. Haddock*, 201 U. S. 562, 26 S. Ct. 525 (1906). This case was overruled by the Supreme Court in *Williams v. North Carolina*, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 133 A. L. R. 1273 (1942); *infra* p. 417. See also *Williams v. State of North Carolina*, 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366 (1945), *infra* p. 417.

106. *CONFLICT OF LAWS RESTATEMENT*, § 113 (1934), which reads in part, "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled in the state and the other is domiciled outside the state, if (a) the spouse who is not domiciled in the state (i) has consented that the other spouse acquire a separate home; or (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home. . . ."

107. Beale, "Haddock Revisited," 39 *HARV. L. REV.* 417 (1926).

108. McClintock, "Fault as an Element of Divorce Jurisdiction," 37 *YALE L. J.* 564 (1928); Bingham, "The American Law Institute vs. the Supreme Court in the Matter of *Haddock v. Haddock*," 21 *CORN. L. Q.* 393 (1936).

109. *Sistare v. Sistare*, 218 U. S. 1, 30 S. Ct. 682 (1910).

110. See *Toncray v. Toncray*, 123 *Tenn.* 476, 131 *S. W.* 977 (1910).

111. *CONFLICT OF LAWS RESTATEMENT*, § 146 (1934).

although the domicile of a child has been changed in the meanwhile to another state.¹¹²

The rules governing legitimacy, legitimation and adoption as they exist today were developed in the main prior to 1900. We have no decisions as yet determining what law governs legitimation from birth. As regards rights of inheritance by adopted children, the Supreme Court of Kansas held in 1909¹¹³ that they were derived from the status, and were governed, therefore, by the law of the state where the adoption took place. This holding was overruled in 1927,¹¹⁴ and it is now established in most states that rights of inheritance are governed by the law governing the succession to the particular property, movable or immovable. The adopted child has been held, however, to retain his rights of inheritance against his natural parents when the local law of the state of adoption had not cut off such rights but the local law governing the inheritance would do so.¹¹⁵

As regards intestate succession, wills and the administration of estates, no important developments have taken place during the last forty years. The construction and interpretation of wills is still said to be governed by the law of the testator's domicile at the time of the execution of the will.¹¹⁶ So far as the question relates to land, it is evident that the rule should have no application when the law of the situs attaches an absolute meaning to the words used by the testator. The law of the situs should govern also if it uses a presumption which is rebuttable only by admissible evidence showing an actual intention to the contrary on the part of the testator.¹¹⁷ This is also the position taken by the *Restatement of the Conflict of Laws*.¹¹⁸

Testamentary trusts in movable property are said to be governed by the law of the testator's domicile.¹¹⁹ The New York courts have sustained them, however, in certain instances where the trust was to be administered under the law of another state the law of which did not object to the administration of such trusts, although the trust was invalid under the local

112. *Stetson v. Stetson*, 80 Me. 483, 15 A. 60 (1888); *Griffin v. Griffin*, 95 Ore. 78, 187 P. 598 (1920).

113. *Boaz v. Swinney*, 79 Kan. 332, 99 P. 621 (1909).

114. *In re Riemann's Estate*, 124 Kan. 539, 262 P. 16 (1927).

115. *Slattery v. Hartford-Connecticut Trust Co.*, 115 Conn. 163, 161 A. 79 (1932).

116. See *Higinbotham v. Manchester*, 113 Conn. 62, 154 A. 242 (1931).

117. Heilman, "Interpretation and Construction of Wills of Immovables in Conflict of Laws Cases Involving 'Election,'" 25 ILL. L. REV. 778 (1931).

118. *CONFLICT OF LAWS RESTATEMENT*, § 251 (1934).

119. *Id.* § 295.

law of New York.¹²⁰ By statute it is provided also in New York that effect shall be given to a declaration by the testator that his will shall be construed in accordance with the law of New York.¹²¹

In the administration of estates there still exist many difficulties which the *Restatement* has attempted to iron out.¹²² By adopting the mercantile theory regarding bills, notes and certificates of stock it has sought to place the law upon a basis harmonizing best with the status of these instruments in the business world. A less progressive spirit is shown on the other hand by the *Restatement* when it recognizes a distinction between executors and administrators, according to which no privity exists as between administrators, whereas such privity does exist between executors in different states where there is identity of person.¹²³

DEVELOPMENTS IN OTHER COUNTRIES

The above survey gives some idea of the development of the conflict of laws in the United States during the last forty years. Let us now consider briefly what has happened in the meanwhile in the rest of the world.

Forty years ago was the era of the Hague Conventions on the conflict of laws. It was felt that the time was ripe for an attempt to provide an international basis for the rules of the conflict of laws. The first effort in the direction of securing identity of rules in the different continental countries was in the matter of civil procedure (judicial assistance), status, matrimonial property rights and bankruptcy. The Conventions on Civil Procedure of 1899 and 1905 were ratified by many continental countries. Conventions relating to marriage, divorce, separation and guardianship were concluded in 1920 and were ratified by several states. Draft conventions on succession and wills, the effect of marriage upon the rights and duties of married persons in their personal relations and upon their property, interdiction and similar measures and bankruptcy were agreed upon at the Hague in 1905 but never reached the convention stage.¹²⁴ The above attempts at the unification of the conflict of laws did not, however, measure up to the expectations that had been entertained. They were elaborated by offi-

120. *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558 (1892).

121. 13 N. Y. Laws (McKinney 1939), "Decedent Estate Law," § 47.

122. CONFLICT OF LAWS RESTATEMENT, §§ 506 (2), 510 (2) (1934).

123. *Id.*, §§ 510, 511.

124. For an English translation of these conventions and drafts, see LORENZEN, *CASES ON THE CONFLICT OF LAWS*, 1st ed., Appendix (1909).

cial delegates from the various governments represented who came under specific instructions. This meant that no agreement could be attained except upon the basis of many compromises, exceptions and reservations, which largely nullified the general objective—uniformity. This situation was aggravated by the fact that, following in the footsteps of the Italian and German legislators, the conventions adopted nationality as the governing principle in matters of status and the like, instead of domicile, the effect of which was so untoward in France that it felt compelled to denounce the conventions.

Disappointed by these efforts, no further attempts were made on the continent to promote general conventions on the subject of the conflict of laws. Interest in the unification of law thereupon shifted to the field of commercial law. In 1912 an international convention was signed at the Hague on the subject of bills of exchange. This was not ratified, however, by any of the signatory states, due in part at least to the outbreak of the First World War. This convention contained a few articles on the conflict of laws.¹²⁵ More recent developments in the direction of securing uniformity in the conflict of laws took place at Geneva, the seat of the League of Nations. In 1923 the Geneva Protocol on Arbitration Clauses was signed providing for the compulsory recognition of arbitration agreements by the contracting states.¹²⁶ It was supplemented by the Geneva Convention for the Enforcement of Foreign Arbitral Awards of 1927,¹²⁷ which has been ratified by many states and has been substantially put into effect in England by the Arbitration (Foreign Awards) Act of 1930.

In 1930 many continental countries entered into the Geneva Convention on Bills of Exchange and Promissory Notes, and in 1931 into a similar convention on the law of checks, in connection with each of which separate conventions were concluded for the settlement of certain conflict of laws problems.¹²⁸ Although the above conventions relating to the conflict of laws

125. For an English translation of this Convention, see LORENZEN, *CONFLICT OF LAWS RELATING TO BILLS AND NOTES*, Appendix (1919).

126. For the text of the conventions, see League of Nations Publications, 1928.II.5, (Economics & Finance). The text may be found also in RUSSELL, *ARBITRATION AND AWARD*, 12th ed. (Aronson) 336 (1931) and in NUSSBAUM, *INTERNATIONAL YEARBOOK ON CIVIL AND COMMERCIAL ARBITRATION* 239 (1928).

127. For the text (in French) of the convention, see 2 NUSSBAUM, *INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESSEN IN ZIVIL- UND HANDELSACHEN* 237 (1928).

128. For the text of these conventions in English, as well as of conventions on stamp laws relating to bills, notes and checks entered into at the same time, see LORENZEN, *CASES AND MATERIALS ON CONFLICT OF LAWS*, 4th ed., 578 (1937).

applicable to bills, notes and checks contained various compromises and reservations, they constitute a forward step in promoting uniformity in the conflict of laws of the different countries.

The movement for the unification of the conflict of laws among the Latin-American states antedated the continental efforts by many years. Nine of the Latin-American states agreed at Lima in 1878 upon a general treaty on the conflict of laws, which was not ratified, however, by any of the states. Eleven years later (1889) another attempt was made at Montevideo. Various treaties were concluded at that time relating to international civil law, international commercial law, international criminal law and international procedural law, which were ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay. Colombia adhered to the Treaty on International Procedural Law in 1920.

The work of unifying the conflict of laws, initiated at the Second Pan-American Conference in the city of Mexico in 1901, was interrupted by the First World War, but was resumed in 1924 when the American Institute of International Law, meeting at Lima, appointed a commission, including Dr. Antonio Sanchez de Bustamante of Havana, Cuba, to draw up a code of private international law. Dr. Bustamante's draft was adopted at the Sixth Pan-American Conference, held in Havana in 1928, with the official title of "Code Bustamante."¹²⁹ Like the Convention of Montevideo of 1889, the Code Bustamante consists of four parts, entitled respectively International Civil Law, International Commercial Law, International Criminal Law and International Law of Procedure. The code was ratified by and is now in force in the following Latin-American countries: Bolivia, Brazil, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic, and Venezuela. As neither Argentina nor Brazil were willing to yield with respect to the fundamental question whether the "personal law" should be determined by nationality or domicile, Brazil having embraced the doctrine of nationality and Argentina adhering to the traditional notion of domicile, the Code Bustamante provides simply that each state shall remain free to adopt either.¹³⁰

In commemoration of the Fiftieth Anniversary of the South American Congress of Private International Law, held at Mon-

129. See BUSTAMANTE, *LA COMMISSION DES JURISCONSULTES DE RIO DE JANEIRO ET LE DROIT INTERNATIONAL* 1 (1928); Lorenzen, "The Pan-American Code of Private International Law," 4 *TULANE L. REV.* 499 (1930).

130. Code Bustamante, art. 7.

tevideo in 1889, a Second South American Congress of Private International Law was held in Montevideo in 1939 and 1940 for the purpose of revising the earlier treaties. These new treaties were signed by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. Brazil signed all except the one on International Civil Law.¹³¹

Since the year 1881 the conflict of laws has been an obligatory subject of study at all French law schools. At that time a chair for that subject exclusively was established at the University of Paris. This step of the French Government stimulated interest in the conflict of laws in France and made the French writers leaders in this field. Important works on the conflict of laws have appeared during the last forty years in many countries, including Latin America.¹³² The growing interest in the conflict of laws during the same period and especially since the First World War is evidenced also by the increased number of reviews devoting themselves exclusively or in part to the conflict of laws and in the establishment of institutes specializing in the study of that subject. The Institute of Comparative Law at Berlin has published from 1928 to 1935 an annual volume containing the decisions of the German courts on the conflict of laws during the preceding year, and the Institute of Legislative Studies of Rome from 1937-1939, five volumes annotating current decisions of the conflict of laws of the leading countries of the world.

Attention may be called also to other activities in the field of the conflict of laws. With the aid of the Carnegie Endowment for International Peace the Hague Academy of International Law was established, under whose auspices lectures on different phases of the conflict of laws have been delivered during the months of July and August of each year, since 1923, by distinguished jurists from all parts of the world. These lectures have been published in the *Recueil des Cours*, of which sixty-six volumes have appeared to date. In France an *Encyclopedia of International Law*, both public and private, edited by Professors de Lapradelle and Niboyet, was published between 1929 and 1931 in ten volumes, including the conflict of laws of the different countries of the world. It was the intention of the publishers to bring the encyclopedia up to date by supplements of which the first appeared in 1934. In 1934 the Comité Français de Droit International Privé was organized in Paris for the purpose of re-examining the fundamental doctrines of the

131. Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo, 1939-1940 (1940).

132. An exhaustive bibliography may be found in 1 BEALE, CONFLICT OF LAWS, xvii-cxii (1935).

French conflict of laws. This committee has met regularly and published the results of its deliberations.

Professor Rabel, formerly director of the Institute of Comparative Law of Berlin, Germany, is engaged at the present time in the laborious task of ascertaining the extent to which the rules laid down in the *Restatement of the Conflict of Laws* by the American Law Institute find support in the positive law of the continental and Latin-American countries.

All this denotes progress. As a result a better understanding has been gained of the practical operation of the rules of the conflict of laws in the different countries. This is not to say, however, that the world is ready for the unification of these rules by international agreement. Complete uniformity is, of course, an ideal which in the realm of finite law will remain forever unattainable. The best to be hoped for is a greater degree of uniformity. Even this will require much effort, patience and good will. The work must begin, as it has, with countries having the same institutions and legal background. If at the conclusion of the present World War a United States of Europe should emerge, progressive steps for the unification of the rules of the conflict of laws may be expected. The experience derived from the Hague and Geneva Conventions should have taught the continental countries valuable lessons from which they may greatly profit when the further unification of their rules of the conflict of laws is to be undertaken. The Latin-American countries have already a code of private international law—the Code Bustamante. The provisions of this code require further amplification and revision to be an effective guide for the solution of the problems in the conflict of laws among the Latin-American states, but when these are made, the adoption of the Code Bustamante by all Latin-American countries may follow. As for the countries of the common law, there exists at the present moment considerable uniformity in the rules of the conflict of laws. It is not unlikely, therefore, that before many years there will exist three large groups of countries in which the rules of the conflict of laws have attained substantial uniformity—the Continental, the Latin-American and the Anglo-American.

Whether greater uniformity is attainable between these groups, especially between the Anglo-American and the others, remains to be seen.¹³³ Professor Rabel is of the opinion that the

133. We have seen that no agreement could be reached on the question whether the "personal law" should be determined with reference to domicile or nationality. Argentina, Colombia, Mexico, Paraguay and Uruguay have failed to ratify the Convention, and of the fifteen countries that have ratified, eight did so with reservations.

present rules of the conflict of laws, derived as they are from the internal law of the different countries, can never operate harmoniously in their application to countries with different legal institutions. He contends, therefore, that the traditional rules of the conflict of laws require restatement and must be framed in more general terms derived by the comparative method from the different legal systems of the world. This would appear to be the scientific way of resolving the difficulties presented today in situations where the conflict of laws rules of the forum have as their background legal institutions of which there is no direct counterpart in the country whose law is to be applied. It would be well if scholars such as Professor Rabel would develop the comparative method in the field of the conflict of laws to a point where the results can be utilized by the courts. Until that time our courts will have to be content to use the traditional methods in dealing with the problems of the conflict of laws. There is some indication that our courts are prepared to adopt a somewhat more realistic approach in conflicts situations. The immediate hopes for the further development of the conflict of laws in this country would seem to lie in this direction.

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9. THE VALIDITY OF WILLS, DEEDS AND CONTRACTS AS REGARDS FORM IN THE CONFLICT OF LAWS*¹

I

IS A WILL complying with the requirements of form where made to be regarded as valid in other places? This was a mooted question in Italy during the fourteenth century. Through the great influence of Bartolus, the founder of the science of Private International Law, the doctrine that such a will was sufficient, regardless of the domicile of the testator or the nature of the property disposed of, became the established view in Italy, from which there has never since been a departure.² This doctrine met with strong opposition in northern France, the stronghold of feudalism, where the principle of the absolute territoriality of the law ("*toutes coutumes sont réelles*") was firmly fixed. It was not until the weakening of feudalism that, notwithstanding the opposition of d'Argentré, the doctrine of Bartolus was accepted in France through the

* (1911) YALE LAW JOURNAL xx, 427.

1. The *Journal du Droit International Privé* will be referred to in this article by "Journal"; the *Revue de Droit International Privé et de Droit Pénal International*, by "Revue"; and the *Zeitschrift für Internationales Privat- und Strafrecht*, by "Zeitschrift."

2. The following account is based largely upon Lainé, *Introduction au droit international privé*, II, 328-428. See also Buzzati, *L'Autorità delle leggi straniere relative alla forma degli atti civili*, 1-49.

The stock example discussed by the early Italian jurists was a will executed by a foreigner at Venice before two witnesses in accordance with the local statute, but not complying with the requisites of the common law (Roman law). The discussion involved, (1) The validity of the local statute; (2) the right of foreigners to avail themselves of the local statute; (3) the validity of the will at the domicile of the testator. The point most hotly controverted was the first, owing to the fact that the Lombard cities of northern Italy, though practically independent, were nominally subject to the Emperor. When an affirmative answer was given to the first point little hesitancy was felt in giving a like answer to points two and three. In view of the fact that the absolute principle of territoriality had not become firmly established in Italy no serious objection could be found to the recognition of a will so executed by the courts of the domicile of the testator. The local laws were a mixture of Roman law and feudal rules and were based, to a considerable extent, upon the principle of the personality of the law. See Lainé, *Introduction au droit international privé*, I, 139-141; II, 335-342.

powerful support which it received from Dumoulin.³ D'Argentré's followers in Belgium succeeded in restoring the supremacy of the law of the situs with respect to immovables through the Edict of Albert and Isabella of 1611. This triumph, however, was only of short duration, for the traditional rule was re-established in 1634, when the Privy Council of the Belgian Provinces, yielding no doubt to public opinion, held, contrary to the express wording of the Edict, that a will relating to immovables in Italy, executed at Brussels in the local form, was valid though it did not meet the requirements of Italian law. No other attempt was made to question the rule. Since the end of the eighteenth century it has prevailed in Holland and Germany as well as in Italy, France and Belgium.

Dumoulin was the first to maintain that *all* legal acts should be regarded as valid if they complied, as regards form, with the law of the place of their execution. This view, according to Lainé, became the general rule.⁴

Practical and not theoretical considerations led to the adoption of the rule that compliance with the law of the place of execution must be deemed sufficient. Bartolus clearly saw the importance of allowing foreigners to execute their wills in the local form.⁵ John Voet and Rodenburgh expressly recognize it as an exception, demanded by the necessities of the case, to the principle that the law of the situs controls the transfer of immovables.

"If we consider strict law," says J. Voet,⁶ "the magistrates of our country are by no means bound, as to property within their territory, to sanction dispositions which conform to the law of the place where they have been executed, but fail to

3. This rule became later known as that of *locus regit actum*. The maxim, it seems, was for the first time formulated in connection with the case *In re Pommereuil*, decided by the Parliament of Paris in 1721. Brillon, commenting upon the decision, began as follows: "*Locus regit actum* for the formality of wills. This maxim has certainly been established by this decision." See Naquet, S. 1903, 1, 75 n.

4. Bar states that, while the rule *locus regit actum* was recognized with respect to wills disposing of immovables in jurisdictions where universal succession obtained, it became never firmly established with respect to transfers of immovables *inter vivos*. Bar, *Private International Law* (Gillespie's transl.), I, Nos. 227, 370.

5. "*Non obstat quod dicitur, quod est temeraria; quia imo utilis et bona, et favorabilis, facta tam ratione testantis, sicut jura statuunt in militantibus, quam etiam ratione eorum quibus relinquitur sicut jura faciunt inter liberos, etiam ratione testium ne a suis negotiis avocentur.*" *In leg. Cunctos populos*, No. 23. See Savigny, *Conflict of Laws* (Guthrie's transl.), 438.

6. Comm. ad Pand., lib. I, app. to tit. 3 and 4, *de Statutis*, Nos. 10, 13.

comply with the solemnities required by the statutes of the place where the property is situated. * * *

"Notwithstanding these principles, the usage of recognizing the observance of the form required by the law of the place where an act occurred as sufficient for its validity has prevailed, so that an act executed in this mode is effective with respect to movables and immovables, even though they be situated in territories whose laws require very different and much greater solemnities. The usage resulted from two considerations: First, it seemed desirable to relieve individuals of the necessity of executing several wills or contracts, by reason of the situation of the property and the diversity of the laws, and to protect them against injury, embarrassment and inextricable difficulties; secondly, it was feared, that many acts performed in good faith would be too easily invalidated with scarcely any fault imputable to the parties. Indeed, the most experienced practitioners, not to speak of those less skilled in the science of law, do not possess sufficient knowledge—and scarcely can the most able acquire such knowledge—of the formalities required in each place for the execution of acts, and the innovations made with respect to these solemnities from one day to another."

Rodenburgh adds: "To oblige a testator to make as many wills as he has property situated in different places, or to execute his will in the form prescribed by several laws is absurd, oppressive, and incompatible with the freedom of disposing by will. In other words, strict law imperatively demands observance of the *lex rei sitae*; but justice authorizes a non-compliance with this rule and the substitution of the *lex loci actus*." ⁷

England did not adopt the continental view as regards immovables. The feudal principles were too strongly entrenched there to allow effect to be given to a foreign law affecting title to English lands.⁸

The recognition of the rule being a concession to foreigners, to enable them to execute their legal transactions in the form familiar to the local lawyer, compliance with such law could not be regarded as obligatory.

7. *De jure quod oritur ex statutorum vel consuetudinum diversitate*, tit. 1, cap. 3, Nos. 1 fg.

8. "The institution of public notaries fell early in this country into great disuse, and deeds and wills were drawn in private, with such legal assistance as the parties might think fit to obtain. Hence, it did not easily occur to the mind of an English lawyer that the necessity of recourse to a public officer, who would of course adopt the form of his own country, might make the forms of the *locus actus* unavoidable." Westlake, *Private International Law*, 4th ed., 10.

Says Rodenburgh: "Although wills, like transfers *inter vivos*, are modes of transmitting title to property, and consequently should be likewise subject to the law where the property is situated, reasons of necessity and of supreme favor have led to the view that conformity to the law of the place of execution should be sufficient. It follows that if any one has not cared to avail himself of the facilities accorded to him, for the reason that, perhaps, it was easier for him to express his last will in the form prescribed by the law of the situs, I do not see what should prevent his will from being valid. No reason of law or equity requires that measures introduced for the benefit of a person should be interpreted to his detriment." ⁹

The question whether a will or other legal act might be executed in the form required by the *lex domicilii* or the *lex rei sitae* was rarely discussed by reason of the fact that the cases actually presented to the courts or to the jurists in their practice were wills executed in conformity to the *lex loci*. The validity of a will meeting the requirements of the *lex domicilii* was assumed by the early writers on the subject. "It is doubtful," says Lainé,¹⁰ "that the nullity of an act contrary to the *lex loci actus* was ever asserted by the Italian jurists." Many jurists of other countries lost sight in the course of time of the fact that the rule *locus regit actum* was merely a concession to foreigners and held that a legal transaction, as regards form, *must* satisfy the requirements of the law of the place of execution.¹¹ Through the celebrated case of *In re Pommereuil*, decided by the Parliament of Paris in 1721, the imperative character of the rule became established in France.

II

The rule that the *lex rei sitae* must govern the validity of all instruments disposing of immovables has never been questioned by English and American courts¹² or text-writers.¹³

9. *De jure quod oritur ex statutorum vel consuetudinum diversitate*, tit. 1, cap. 3, Nos. 1 fg.

10. II, 400.

11. See Pothier, *Traité des donations testamentaires*, ch. 1, art. 2, sec. 1, No. 9 (ed. Bugnet, VIII, 228); Merlin, *Répertoire*, Testament, Secs. 2, 4, Art. 2.

12. *Coppin v. Coppin*, 1725, 2 P. W. 291; *Adams v. Clutterbuck*, 1883, 10 Q. B. D., 403.

Robinson v. Bland, 1760, 2 Burr, 1079, Lord Mansfield: "In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of lands, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the

The exclusiveness of the law of the situs has been deemed to rest upon such a strong foundation of public policy that there is to this date no exception to the rule in England.¹⁴ In the United States a good many states have modified the common law by statute in favor of the continental view. The following jurisdictions allow a will executed in another state to conform to the *lex loci*: Alaska,¹⁵ Arkansas,¹⁶ Connecticut,¹⁷ Iowa,¹⁸ Louisiana,¹⁹ Maine,²⁰ Maryland,²¹ Massachusetts,²² Minnesota,²³ Montana,²⁴ New Hampshire,²⁵ New Mexico,²⁶ North Dakota,²⁷

thing requires them to be carried into execution according to the law here."

Curtis v. Hutton, 1808, 14 Ves., 541, Sir William Grant: "The validity of every disposition of real estate must depend upon the law of the country in which the estate is situated."

United States v. Crosby, 1812, 7 Cranch., 115, Story, J.: "The question presented for consideration is, whether the *lex loci contractus* or the *lex loci rei sitae* is to govern in the disposal of real estates. The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."

U. S. v. Fox, 1876, 94 U. S., 315, Field, J.: "It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

13. Dicey, *Conflict of Laws* (2d ed.), 500, 502, 504; Foote, *Private International Jurisprudence* (3d ed.), 214, 216; Minor, *Conflict of Laws*, Secs. 11-12; Nelson, *Private International Law*, 146, 194; Phillimore, *International Law*, IV, 466 fg.; Rattigan, *Private International Law*, 82; Rorer, *American Interstate Law* (2d ed.), 285-288; Story, *Conflict of Laws* (8th ed.), Sec. 424; Westlake, *Private International Law* (4th ed.), 203; Wharton, *Conflict of Laws* (3d ed.), Secs. 274, 276 b.

14. Under sections 1 and 2 of the English Wills Act a will made by British subjects disposing of chattels real in the United Kingdom need not comply with the formalities required by the law of the *situs*.

As to the decreasing influence of the *lex situs* in general in English law, see Dicey, *Conflict of Laws* (2d ed.), 728-729.

15. *Carter's Annotated Codes*, 1900, Part V, Sec. 150.

16. *Kirby's Digest of the Statutes*, 1904, Sec. 8049.

17. *General Statutes*, 1902, Sec. 293.

18. *Annotated Code*, 1897, Sec. 3309.

19. *Merrick's Rev. Civil Code*, 1900, Art. 1596.

20. *Revised Statutes*, 1903, ch. 66, Sec. 13.

21. *Code*, 1904, Art. 93, Sec. 327.

22. *Revised Laws*, 1902, ch. 135, Sec. 5.

23. *Revised Laws*, 1905, Sec. 3662.

24. *Revised Codes*, 1907, Sec. 4734.

25. *Public Statutes*, 1901, ch. 186, Sec. 5.

26. *Compiled Laws*, 1897, Sec. 1976.

27. *Revised Code*, 1905, Sec. 5097.

Oklahoma,²⁸ Rhode Island,²⁹ South Dakota,³⁰ Utah,³¹ Vermont,³² and Wisconsin.³³ The following allow it where the will is executed in a foreign country: Connecticut,³⁴ Iowa,³⁵ Louisiana,³⁶ Maine,³⁷ Maryland,³⁸ Massachusetts,³⁹ Minnesota,⁴⁰ Montana,⁴¹ New Hampshire,⁴² New Mexico,⁴³ North Dakota,⁴⁴ Oklahoma,⁴⁵ South Dakota,⁴⁶ Utah,⁴⁷ Vermont,⁴⁸ Wisconsin.⁴⁹ In Montana,⁵⁰ North Dakota,⁵¹ Oklahoma,⁵² South Dakota,⁵³ and Utah,⁵⁴ the *lex loci* can be followed only when the testator's domicile is not within the state. In Iowa⁵⁵ and Wisconsin⁵⁶ a proviso is added that the will must be in writing and subscribed by the testator.⁵⁷

28. *Compiled Laws*, 1909, Sec. 8901.

29. *General Laws*, 1909, ch. 254, Sec. 36.

30. *Revised Code*, 1903, *Civil Code*, Sec. 1010.

31. *Compiled Statutes*, 1907, Sec. 2744.

32. *Public Statutes*, 1906, Sec. 2750.

33. *Statutes*, 1898, Sec. 2283.

34. *General Statutes*, 1902, Sec. 293.

35. *Annotated Code*, 1897, Sec. 3309.

36. *Merrick's Rev. Civil Code*, 1900, Art. 1596.

37. *Revised Statutes*, 1903, ch. 66, Sec. 13.

38. *Code*, 1904, Art. 93, Sec. 327.

39. *Revised Laws*, 1902, ch. 135, Sec. 5.

40. *Revised Laws*, 1905, Sec. 3662.

41. *Revised Codes*, 1907, Sec. 4734.

42. *Public Statutes*, 1901, ch. 186, Sec. 5.

43. *Compiled Laws*, 1897, Sec. 1976.

44. *Revised Code*, 1905, Sec. 5097.

45. *Compiled Laws*, 1909, Sec. 8901.

46. *Revised Code*, 1903, *Civil Code*, Sec. 1010.

47. *Compiled Statutes*, 1907, Sec. 2744.

48. *Public Statutes*, 1906, Sec. 2750.

49. *Statutes*, 1898, Sec. 2283.

50. *Revised Codes*, 1907, Sec. 4734.

51. *Revised Code*, 1905, Sec. 5097.

52. *Compiled Laws*, 1909, Sec. 8901.

53. *Revised Code*, 1903, *Civil Code*, Sec. 1010.

54. *Compiled Statutes*, 1907, Sec. 2744.

55. *Annotated Code*, 1897, Sec. 3309.

56. *Statutes*, 1898, Sec. 2283.

57. In Arkansas the statutory modification exists only in favor of citizens of the United States. (*Kirby's Digest of the Statutes of 1904*, Sec. 8049.) In Maryland there is the following proviso with respect to testators originally domiciled in Maryland: "If the testator was originally domiciled in Maryland, although at the time of making the will or at the time of his death he may be domiciled elsewhere, the said will or testamentary instrument then so executed shall be admitted to probate in any orphans' court of this State; and when so admitted shall be governed by and construed and interpreted according to the law of Maryland, without regard to the *lex domicilii*, unless the testator shall expressly declare a contrary intention in said will or testamentary instrument. Code, 1904, Art. 93, Sec. 327.

Fewer jurisdictions have adopted a similar modification of the common law in regard to the transfer of immovables *inter vivos*. Alaska,⁵⁸ Connecticut,⁵⁹ Illinois,⁶⁰ Kansas,⁶¹ Michigan,⁶² Minnesota,⁶³ Nebraska,⁶⁴ Ohio,⁶⁵ Oregon,⁶⁶ Rhode Island,⁶⁷ Vermont,⁶⁸ and Wisconsin,⁶⁹ allow compliance with the *lex loci* when the instrument is executed in another state. Illinois,⁷⁰ Kansas,⁷¹ Michigan,⁷² Minnesota,⁷³ Nebraska,⁷⁴ Ohio,⁷⁵ Oregon,⁷⁶ Vermont,⁷⁷ and Wisconsin,⁷⁸ have extended the rule to instruments executed in foreign countries. The acknowledgment of the instrument before a proper officer is prescribed by all of these states.

The rule of the English law governing the validity of wills disposing of movables was not certain until 1830. Wills of Englishmen, apparently domiciled abroad, had been admitted to probate when they were executed in the English form.⁷⁹ In *Curling v. Thornton* the learned judge strongly intimated that an English testator domiciled in a foreign country *must* comply with the law of England.⁸⁰ The English law was settled by the decision of the House of Delegates in *Stanley v. Bernes*,⁸¹ which

58. *Carter's Annotated Codes*, 1900, Part V, Sec. 83.

59. *General Statutes*, 1902, Secs. 4031, 4029. Amended by *Laws of 1905*, 290.

60. *Revised Statutes*, 1908, ch. 30, Sec. 20.

61. *General Statutes*, 1909, Sec. 1676.

62. *Compiled Laws*, 1897, III, Sec. 8963.

63. *Revised Laws*, 1905, Sec. 2691.

64. *Compiled Statutes*, 1909, Annotated, 4757, Sec. 4.

65. *Bates' Annotated Statutes* (6th ed. by Everett), II, Sec. 4111.

66. *Code*, 1902, Sec. 5343 (Amended by Act of Feb. 25, 1907).

67. *General Laws*, 1909, ch. 253, Sec. 8.

68. *Public Statutes*, 1906, Sec. 2598.

69. *Statutes*, 1898, Sec. 2218.

70. *Revised Statutes*, 1908, ch. 30, Sec. 23.

71. *General Statutes*, 1909, Sec. 1676.

72. *Compiled Laws*, 1897, III, Sec. 8965.

73. *Revised Laws*, 1905, Sec. 2691.

74. *Compiled Statutes*, 1909, Annotated, 4761, Sec. 6.

75. *Bates' Annotated Statutes* (6th ed. by Everett), II, Sec. 4111.

76. *Code*, 1902, Sec. 5345 (Amended by Act of Feb. 25, 1907).

77. *Public Statutes*, 1906, Sec. 2598.

78. *Statutes*, 1898, Sec. 2220.

79. *Duchess of Kingston's case*, cited in 2 Add., 21; *Curling v. Thornton*, 1823, 2 Add., 6.

80. "It may be doubted whether a British subject is entitled so far '*exuere patriam*,' as to select a foreign domicile in complete derogation of his British; which he must, at all events, do, in order to render his property in this country liable to distribution according to any foreign law," 2 Add., 171.

81. (1830) 3 Hagg., 447. See also *Craigie v. Lewin*, 1842, 3 Curt. Ecc., 435; *De Zichy Ferraris v. Hertford*, 1843, 3 Curt. Ecc., 468; *affd.*, *Crocker*

held that the *lex domicilii* at the time of death must determine the formal validity of a will disposing of movable property. The same rule has prevailed in this country from the earliest time.⁸² The conclusion has been drawn therefrom that a will validly executed according to the law of the domicile of the testator at the time of such execution may be invalidated by a subsequent change of domicile.⁸³

The hardship of the imperative character of the rule was not sufficiently felt in England until 1857, when the will of an Englishwoman, executed in Paris in the English form, was declared void by the Privy Council, because it did not conform to the law of France, where she was domiciled.⁸⁴ As a result of this case,⁸⁵ Lord Kingsdown secured the passage of an act of Parliament,⁸⁶ through which extremely liberal doctrines with respect to the formal execution of wills disposing of movables and chattels real were introduced into English law. According to its provisions, "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

"Every will and other testamentary instrument made within the United Kingdom by any British subject (wherever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the

v. Hertford, 1844, 4 Moo. P. C., 339; *Bremer v. Freeman*, 1857, 10 Moo. P. C., 306.

82. *Desesbats v. Berquier*, 1 Bin. (Pa.), 336 (1808); *Grattan v. Appleton*, 3 Story, 755 (1845); *Harvey v. Richards*, 1 Mason, 381 (1818).

83. *Nat v. Coons*, 10 Mo., 543 (1847); *Moultrie v. Hunt*, 23 N. Y., 394 (1861); *In re Beaumont's Estate*, 216 Pa., 350 (1907). See also Nelson, *Private International Law*, 194, 195; Phillimore, *International Law*, IV, 629-630.

84. *Bremer v. Freeman*, 1857, 10 Moo. P. C., 306.

85. Phillimore, *International Law*, IV, 226.

86. *The Wills Act*, 1861, 24 and 25, Vict., c. 114.

laws for the time being in force in that part of the United Kingdom where the same is made.

"No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."

In the United States, Connecticut,⁸⁷ Iowa,⁸⁸ Louisiana,⁸⁹ Maine,⁹⁰ Maryland,⁹¹ Massachusetts,⁹² Minnesota,⁹³ Missouri,⁹⁴ Montana,⁹⁵ New Hampshire,⁹⁶ North Dakota,⁹⁷ Oklahoma,⁹⁸ Oregon,⁹⁹ Rhode Island,¹⁰⁰ South Dakota,¹⁰¹ Utah,¹⁰² Vermont,¹⁰³ and Wisconsin,¹⁰⁴ have by statute changed the rule that the *lex domicilii* of the testator at the time of his death must govern the formal validity of wills disposing of personal property. They allow the testator to conform to the *lex loci*, regardless of the fact whether the will is executed in one of the United States or in a foreign country.¹⁰⁵ Alaska¹⁰⁶ and Arkansas¹⁰⁷ allow it only where the will is executed within the United States. New York¹⁰⁸ allows it only where the will is executed within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland. Alaska,¹⁰⁹ Montana,¹¹⁰ North Dakota,¹¹¹ Oklahoma,¹¹² Oregon,¹¹³ South Dakota,¹¹⁴ and Utah,¹¹⁵

87. *General Statutes*, 1902, Sec. 293.

88. *Annotated Code*, 1897, Sec. 3309.

89. *Merrick's Rev. Civil Code*, 1900, Art. 1596.

90. *Revised Statutes*, 1903, ch. 66, Sec. 13.

91. *Code*, 1904, Art. 93, Sec. 327.

92. *Revised Laws*, 1902, ch. 135, Sec. 5.

93. *Revised Laws*, 1905, Sec. 3662.

94. *Annotated Statutes*, 1906, Sec. 4634.

95. *Revised Codes*, 1907, Sec. 4734.

96. *Public Statutes*, 1901, ch. 186, Sec. 5.

97. *Revised Code*, 1905, Sec. 5097.

98. *Compiled Laws*, 1909, Sec. 8901.

99. *Bellinger & Cotton's Annotated Codes & Statutes*, 1902, Sec. 5561.

100. *General Laws*, 1909, ch. 254, Sec. 36.

101. *Revised Code*, 1903, Civil Code, Sec. 1010.

102. *Compiled Statutes*, 1907, Sec. 2744.

103. *Public Statutes*, 1906, Sec. 2750.

104. *Statutes*, 1898, Sec. 2283.

105. Arkansas limits the right to citizens of the United States (*Kirby's Digest of the Statutes*, 1904, Sec. 8049). Maryland contains the proviso above mentioned. See, ante, note 57.

106. *Carter's Annotated Codes*, 1900, Part V, Sec. 150.

107. *Kirby's Digest of the Statutes*, 1904, Sec. 8049.

108. *Consolidated Laws*, 1909; *Decedent Estate Law*, Wills, Sec. 23.

109. *Carter's Annotated Codes*, 1900, Part V, Sec. 150.

110. *Revised Codes*, 1907, Sec. 4734.

111. *Revised Code*, 1905, Sec. 5097.

112. *Compiled Laws*, 1909, Sec. 8901.

113. *Bellinger & Cotton's Annotated Codes & Statutes*, 1902, Sec. 5561.

114. *Revised Code*, 1903, Civil Code, Sec. 1010.

115. *Compiled Statutes*, 1907, Sec. 2744.

permit compliance with the *lex loci* only when the testator is domiciled without the state. Iowa,¹¹⁶ Minnesota,¹¹⁷ and Wisconsin,¹¹⁸ require that the will shall be in writing and subscribed by the testator.

In Maryland,¹¹⁹ Montana,¹²⁰ North Dakota,¹²¹ Oklahoma,¹²² Rhode Island,¹²³ South Dakota,¹²⁴ and Utah,¹²⁵ a will may be validly executed in conformity with the law of the testator's domicile at the time of the execution.¹²⁶ Rhode Island¹²⁷ allows this only where the will is executed within the United States. In Arkansas,¹²⁸ Illinois,¹²⁹ Maryland,¹³⁰ Missouri,¹³¹ New York,¹³² and Oregon,¹³³ a will is entitled to probate if it satisfies the requirements of the *lex fori*.¹³⁴ Montana,¹³⁵ New York,¹³⁶ North Dakota,¹³⁷ Oklahoma,¹³⁸ and South Dakota,¹³⁹ expressly provide that a will executed according to the *lex loci* or the *lex domicilii* of the testator at the time of its execution shall not be invalidated by a subsequent change of domicile.

With respect to contracts a distinction is made between formalities going to the existence of the contract and those relating merely to the evidence by which such contract is to be established. A contract, void under the *lex loci* for want of a stamp, is unenforceable everywhere. An exception to this rule has been introduced by Sec. 72, 1, *a*, of the English Bills of Exchange Act, which provides that "where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue."

116. *Annotated Code*, 1897, Sec. 3309.

117. *Revised Laws*, 1905, Sec. 3662.

118. *Statutes*, 1898, sec. 2283.

119. *Code*, 1904, Art. 93, Sec. 327.

120. *Revised Codes*, 1907, Sec. 4734.

121. *Revised Code*, 1905, Sec. 5097.

122. *Compiled Laws*, 1909, Sec. 8901.

123. *General Laws*, 1909, ch. 254, Sec. 36.

124. *Revised Code*, 1903, Civil Code, Sec. 1010.

125. *Compiled Statutes*, 1907, Sec. 2744.

126. Maryland contains the proviso above mentioned, ante note 57.

127. *General Laws*, 1909, ch. 254, Sec. 36.

128. *Kirby's Digest of the Statutes*, 1904, Sec. 8049.

129. *Revised Statutes*, 1909, ch. 148, Sec. 10.

130. *Code*, 1904, Art. 93, Sec. 327.

131. *Annotated Statutes*, 1906, Sec. 4634.

132. *Consolidated Laws*, 1909; *Decedent Estate Law, Wills*, Sec. 23.

133. *Bellinger & Cotton's Annotated Codes & Statutes*, 1902, Sec. 5561.

134. Arkansas allows it only where the testator is a citizen of the United States. (*Kirby's Digest of the Statutes*, 1904, Sec. 8049.) Maryland contains the proviso above mentioned. (*Supra*, note 57.)

135. *Revised Codes*, 1907, Sec. 4735.

136. *Consolidated Laws*, 1909; *Decedent Estate Law, Wills*, Sec. 24.

137. *Revised Code*, 1905, Sec. 5099.

138. *Compiled Laws*, 1909, Sec. 8903.

139. *Revised Code*, 1903, Civil Code, Sec. 1012.

If the contract exists under the *lex loci*, although it cannot be proved under such law without the stamp, effect will be given to it by English and American courts, subject to any stamp law of the forum. The requirement of the stamp would be regarded in this case as relating merely to the proof of the contract and as falling within the rule that all matters relating to procedure are governed by the *lex fori*.¹⁴⁰

The case of *Leroux v. Brown*¹⁴¹ suggested a distinction similar to the above with respect to the fourth and seventeenth sections of the English Statute of Frauds. It was held in that case that the fourth section of the English Statute of Frauds ("no action shall be brought") applied to a contract made in France which was not to be performed within the space of one year from the making thereof, so as to prevent its enforcement in England, for want of a written memorandum, notwithstanding the validity of the contract according to French law. The court intimated, however, that the seventeenth section ("no contract for the sale of any goods, wares, merchandise, for the price of 10 pounds or upwards, shall be allowed to be good") must be deemed to relate to the existence of the contract and not merely to the evidence thereof.¹⁴² The English Sales of Goods Act of 1893,¹⁴³ by substituting the words "shall not be enforceable by

140. *Alves v. Hodgson*, 1707, 7 T. R., 241; *Clegg v. Levy*, 3 Camp., 166 (1811); *Bristow v. Sequeville*, 5 Ex., 275 (1850); *Fant v. Miller*, 17 Grat. (Va.), 47 (1866); *Satterthwaite v. Doughty*, 44 N. C., 314 (1853).

The early English cases did not recognize the above distinction on the ground that the revenue laws of a foreign country would not be enforced. *James v. Catherwood*, 3 Dowl. & Ry., 190 (1823); *Wynne v. Jackson*, 2 Russ., 351 (1826). The same view was adopted also by the early American cases. *Ludlow v. Van Renssaelar*, 1 Johns. N. Y., 93 (1806); *Skinner v. Tinker*, 34 Barb., 333 (1861).

141. *Leroux v. Brown*, 1852, 12 C. B., 801.

142. Jervis, C. J.: "The statute, in this part of it, does not say, that, unless those requisites are complied with, the contract shall be void, but merely that no action shall be brought upon it * * * 'unless the agreement, or some memorandum or note thereof, shall be in writing,'—words which are satisfied if there be any written evidence of a previous agreement—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced by writing."

Maul, J.: "But we have been pressed with cases which it is said have decided that the words 'no action shall be brought' in the fourth section, are equivalent to the words 'no contract shall be allowed to be good' which are found in another part of the statute. * * * It may be, that, for some purposes, the words used in the fourth and seventeenth sections may be equivalent; but they clearly are not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French Court of law."

143. 56 and 57 Vict., ch. 7, Sec. 4.

action" for those formerly found in the seventeenth section, has removed every basis for such a distinction between the two sections in England.

The view expressed, by way of dictum, in *Leroux v. Brown*, in regard to the seventeenth section, has been adopted by the courts of the United States.¹⁴⁴ The actual decision of *Leroux v. Brown* in regard to the fourth section has also met with the approval of our courts.¹⁴⁵ One or two recent cases seem to regard this section as relating to the existence of the contract.¹⁴⁶

Where the formality is deemed to relate to the validity of the contract the problem is presented: What law shall govern in this respect?

It is generally said that the law of the place of making governs.¹⁴⁷ The case most frequently relied upon in the United

144. *Hunt v. Jones*, 12 R. I., 265 (1879); *Houghtaling v. Ball*, 19 Mo., 84; 20 Mo., 563 (1855); *Cling v. Fries*, 33 Mich., 275 (1876); *De Costa v. Davis*, 24 N. J. Law, 319 (1854); *Low v. Andrews*, Fed. Cas. No. 8559 (1839); *Allen v. Schuchardt*, Fed. Cas. No. 236 (1861); *Brockman Commission Co. v. Kilbourne*, 111 Mo. App., 542, 86 S. W., 275 (1905).

So as to contract for the sale of realty. *Wolf v. Burke*, 18 Col., 264, 32 Pac., 427 (1893).

In view of the fact that the statute may be satisfied by a note or memorandum made subsequent to the time of the making of the contract, by an acceptance and receipt of part of the goods, or by the giving of something in earnest to bind the contract, or in part payment, it is evident that the contract exists without such writing, though it can be enforced only when the statute has been satisfied. The cases must, therefore, be regarded as limiting the term "procedure" so as to permit the enforcement of a contract which is valid where made.

145. *Heaton v. Eldridge*, 56 Oh. St., 87 (1897); *Buhl v. Stephens*, 84 Fed., 922 (1898); *Third Nat. Bank v. Steel*, 129 Mich., 434 (1902).

146. *Cochran v. Ward*, 5 Ind. App., 89, 29 N. E., 795 (1892); *Miller v. Wilson*, 146 Ill., 533, 34 N. E., 1111 (1893).

The question arose in these cases with respect to contracts for the sale of real property. There is nothing in the opinions to indicate whether the same conclusion would have been reached with respect to the other classes of contracts within this section.

147. *Burge, Colonial & Foreign Laws*, I, 22; II, 38 (new ed.); *Dicey, Conflict of Laws*, R. 150; *Foote, Private International Jurisprudence* (3d ed.), 371; *Minor, Conflict of Laws*, 411; *Nelson, Private International Law*, 257, 258; *Rattigan, Private International Law*, 128; *Story, Conflict of Laws* (8th ed.), Secs. 260, 261; *Westlake, Private International Law* (4th ed.), 271-274; *Wharton, Conflict of Laws* (3d ed.), II, 884, 900, 912.

Story's position is not clear. In Sec. 280 he says: "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."

States in support of this statement is *Scudder v. The Union National Bank*,¹⁴⁸ in the opinion of which the Supreme Court says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made." This statement was purely dictum. According to the view taken of the facts by the learned court no conflict of laws was involved in the case.¹⁴⁹ Moreover, the Supreme Court has not adopted the rule that the *lex loci* will under all circumstances govern the "execution, the interpretation and the validity" of contracts.¹⁵⁰ That it has not done so in regard to the formal requisites of contracts is made perfectly plain by the case of *Hall v. Cordell*.¹⁵¹

Where the contract is entered into by correspondence the law of the place where the last act is done to make it a binding obligation will govern its validity as regards form.¹⁵²

Certain English cases can be best sustained by a recognition of the principle that a contract may conform to the law with reference to which the parties must be deemed to have contracted, though such law be not that of the place of execution.¹⁵³

148. 91 U. S., 406 (1875); see also *Hunt v. Jones*, 12 R. I., 265 (1879); *De Costa v. Davis*, 24 N. J. Law, 319 (1854); *Perry v. Mount Hope Iron Co.*, 15 R. I., 380 (1886).

149. The facts of the case were as follows: A member of a Missouri firm, while in Chicago, verbally agreed on behalf of his firm to pay a draft which had been drawn upon his firm by Leland & Harbach, of Chicago. Under Missouri law an acceptance of a bill of exchange or an agreement to accept bills of exchange to be drawn in the future must be in writing. The opinion of the Supreme Court clearly shows that the court did not consider the question whether the law of the place of making or the law of the place of performance should govern the validity of a contract as regards form, for the learned court says: "There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange; on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance."

150. See *The London Assurance v. Companhia de Moagens De Barreiro*, 167 U. S., 149 (1897); *Liverpool & G. W. Steamship Co. v. Phoenix Iron Co.*, 129 U. S., 397 (1889).

151. 142 U. S., 116 (1891).

152. *Perry v. Mt. Hope Iron Co.*, 15 R. I., 380 (1886).

153. *Van Grutten v. Digby*, 1862, 32 L. J., Ch. 179; *Re Marseilles Extension Co.*, 1885, 30 Ch. D., 598.

Dicey¹⁵⁴ is disposed to recognize this as an exception to the general rule that the *lex loci* governs. Certain cases in this country are to the same effect. In *Hall v. Cordell*,¹⁵⁵ the defendants of Chicago, at Marshall, Mo. verbally agreed with plaintiffs, bankers at the latter place, that defendants would accept and pay all drafts drawn upon them by Farlow for cattle bought by Farlow and shipped by him to defendants from Missouri. Defendants refused to pay upon presentation a draft drawn upon them under this agreement. By statute in Missouri an agreement to accept bills of exchange must be in writing. Defendants contended that by reason of that statute the contract could not be the basis for a recovery in Illinois. The Supreme Court held: "We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that state can have no application to an action brought to charge a person, in Illinois, upon a parol promise, to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the state of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties."¹⁵⁶

It cannot be said that the English and American cases have definitely adopted the *lex loci* as determining the validity of contracts as regards form, with the qualification that, where under the general rules of the forum governing the validity of contracts in general some other law is applicable, the contract may conform also in the matter of form to such other law. The chief point in controversy in most American cases relating to form has been whether the requirement of form related to procedure or to the substance. The question whether a contract with respect to a formal requirement admittedly relating to the substance should be subject to the *lex loci contractus* as dis-

154. "Possibly a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (?)." Dicey, *Conflict of Laws* (2d ed.), 543. See also Nelson, *Private International Law*, 258.

155. 142 U. S., 116 (1891).

156. Accord: *Hubbard v. Exchange Bank*, 72 Fed., 234 (1896). See also *Wilson v. Lewiston Mill Co.*, 150 N. Y., 314 (1896).

tinguished from the *lex loci solutionis* has been rarely considered. The law applied in these cases was the law deemed by the courts to govern the validity of the contract in general. The thought that the parties had an option in regard to the formal requirements of contracts to comply either with the law of the place of making or with that of the place of performance did not occur to any court. There are dicta in English cases to the effect that capacity to contract shall be subject to the law of domicile, irrespective of the law applicable to the validity of the contract in other regards;¹⁵⁷ whereas the courts of this country are agreed that the law governing contractual capacity is the *lex loci contractus*.¹⁵⁸ But there are no decisions, or dicta, in England or the United States, to the effect that the requisites of form shall be controlled by a distinct law. The question as to what law shall govern the formal validity of contracts is still regarded by the Anglo-American courts as a part of the larger and more complex problem relating to the obligation and validity of contracts in general. As long as this attitude continues, the rule applicable to the "form" of contracts must remain in the same state of uncertainty as is the law governing the validity of contracts in other respects.¹⁵⁹

In regard to bills of exchange, the English Bills of Exchange Act provides that "the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made." (Sec. 72.) To this rule two exceptions are made. One relates to bills issued out of the United Kingdom which, as seen above, are to be regarded as valid though they do not comply with the stamp laws of the place of issue. The second exception, modeled after Art. 85 of the German Bills of Exchange Act, provides that "where a bill, issued out of the United Kingdom, conforms as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

Before the Act it was uncertain whether an indorsement which did not comply with the *lex loci* should be regarded

157. *Sottomayor v. De Barros*, L. R. Prob. & Div. 1 (1877); *Cooper v. Cooper*, 13 App. Cas., 88, 108 (1888).

158. *Nichols & Shepard Co. v. Marshall*, 108 Ia., 518 (1899); *Milliken v. Pratt*, 125 Mass., 374 (1878); *Thompson v. Taylor*, 66 N. J. Law, 253 (1901).

159. See Beale, "What Law Governs the Validity of a Contract," *Harvard Law Review*, XXIII, 1-11, 79-103, 194-208, 260-272.

as sufficient with respect to an acceptor, if it satisfied the law governing the acceptor's contract.¹⁶⁰ In the United States there are no cases on this point. The Negotiable Instruments Law, which has been adopted by most of the United States, fails to lay down any rules governing the Conflict of Laws.

Dicey mentions two other possible exceptions to the rule that the *lex loci* is paramount with respect to the formal requirements of contracts. He says:¹⁶¹

"(1) The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?).

"(2) A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*)."

The second of these exceptions will probably be recognized by the courts of the United States in view of the tendency of the more recent cases to follow the English and continental view, which makes the transfer of title to personal property *inter vivos* dependent upon the law of its *situs*.¹⁶²

American courts are divided in regard to the first exception. It has been held that where the formality relates to the substance the law of the *situs* of the property must govern.¹⁶³ Other cases show a preference for the *lex loci*.¹⁶⁴

160. *Lebel v. Tucker*, 1867, 3 Q. B., 77; *Bradlaugh v. De Rin*, L. R., 3 C. P., 538 (1868).

161. Dicey, *Conflict of Laws* (2d ed.), 542-543.

162. *Cammel v. Sewell*, 1860, 5 Hurl & N., 728; *Green v. Van Buskirk*, 1866, 5 Wall., 307; 1868, 7 Wall., 139; *Lees v. Harding, Whitman & Co.*, 68 N. J. Eq., 622 (1905); *Schmidt v. Perkins*, 74 N. J. Law, 785 (1907).

The formality would probably consist of the necessity of delivery or of registration in some public office. Its purpose would be to protect creditors or purchasers and not to guarantee the free expression of the parties' will. Formalities of the latter kind or alone under consideration. For a discussion of the different kinds of formalities from the standpoint of the *Conflict of Laws*, see Audinet, *Droit international privé* (2d ed.), 261; Bar, *Private International Law*, Sec. 121; Esperson, *Journal*, IX, 157; Fuzier-Herman, *Répertoire, Forms des Actes*, Nos. 15, 16; Lainé, *Introduction au droit international privé*, II, 330; Pillet, *Principes de droit international privé*, 474, 475.

163. *Meylink v. Rhea*, 123 Ia., 310 (1904).

Speaking of English law, Dicey says: "On this last point it is necessary to speak with considerable hesitation. The language of authors, such as Westlake or Story, certainly suggests that every question with regard to an immovable, and therefore the formal validity of a contract having reference to land, is governed by the *lex situs*. No reported case, moreover, it is submitted, contradicts this conclusion, and *Adams v. Clutterbuck* is in its favor." Dicey, *Conflict of Laws* (2d ed.), 502.

See also Nelson, *Private International Law*, 260; Phillimore, *Inter-*

The English and American rules governing the formal validity of wills, deeds, and contracts, refer to the territorial law of the state or country in question. There is only one English case (an *ex parte* decision) decided under the Wills Act, which holds that the *lex loci*, as regards form, meant foreign law in its totality, inclusive of its rules relating to the Conflict of Laws.¹⁶⁵

It may be said, then, that in England and the United States, the law governing the validity of a will or deed in general, determines also, in the absence of statute, its requirements as to form. In the case of contracts the *lex fori* will govern if the form in which the contract must be clothed relates merely to its proof. Where the formality relates to the validity of the contract, the governing law is not entirely clear, owing to the uncertainty of the English and American law with respect to the law applicable to the validity of contracts in general. It would seem that the law governing the validity of the contract in other respects will determine also its validity in the matter of form.

III

Continental courts are agreed that the "means of proof" should be determined by the law governing the legal acts in question, and that only the "administration of proof" should be subject to the *lex fori*.¹⁶⁶ The mere fact, therefore, that the *national Law* (3d ed.), IV, 596; Story, *Conflict of Laws* (8th ed.), Sec. 372 f.

The Court of Appeal recently held that the question of capacity to execute a contract affecting land must be determined by the *lex rei sitae*. *Bank of Africa v. Cohen* (1909), 2 Ch., 129; 78 L. J. Ch., 767.

164. It is held that if the plaintiff waives his right to the land and sues for breach of contract the *lex loci* and not the *lex rei sitae* will determine the measure of damages. *Atwood v. Walker*, 179 Mass., 514 (1901); *Finnes v. Selover, Bates & Co.*, 102 Minn., 334 (1907). The *lex loci* has been held to govern also the question as to the implied existence of covenants not running with the land. *Bethell v. Bethell*, 54 Ind., 428 (1876). Specific performance of a personal covenant valid under the *lex loci*, but not under the *lex rei sitae*, has been granted by the courts of the state in which the land is situate where it appeared that the acts called for could be done consistently with the law of situs. *Polson v. Stewart*, 167 Mass., 211 (1897).

See also Minor, *Conflict of Laws*, 32, 416; Rorer, *American Interstate Law* (2d ed.), 289, 290; Story, *Conflict of Laws* (8th ed.), Secs. 363, 364, 372 d; Wharton, *Conflict of Laws* (3d ed.), Secs. 276 a, 276 d, 693 b.

165. In the *Goods of Lacroix*, 1887, L. R., 2 P. D., 94. See Lorenzen, "The *Renvoi* Theory and the Application of Foreign Law," *Col. L. Rev.*, X, 190-207, 327-344; Dicey, *Conflict of Laws*, R. 150 ("Any contract is formally valid which is made in accordance with any form recognized as valid by the law of the country where the contract is made.")

166. So expressly Art. 10 Prel. Disp. Italian Civ. Code; so France, Cass., Aug. 24, 1880, S. 1880, 1, 413; Cass., May 23, 1892, S. 1892, 1, 521; Cass., June 14, 1899, S. 1900, 1, 225.

law of the forum requires written evidence where the amount involved exceeds a certain sum is of no consequence. On the other hand, no action will be given when none will lie, for want of written evidence, under the law applicable to the creation of the legal act. They are also generally agreed that dispositions of property by will, whether movable or immovable, shall be valid as regards form if they comply with the law of the place of execution.¹⁶⁷ In other respects there is a wide difference of view. The rules obtaining in France, Italy, Spain and Germany are of interest for purposes of comparison.¹⁶⁸

France. The first draft of the French Civil Code contained the following provision: "The form of legal transactions is governed by the law of the country in which they are executed or take place."¹⁶⁹ A special application of this general rule was found in Arts. 47, 170, 999. It seems that the framers of the Code did not intend to prescribe this rule absolutely, but to make compliance with the *lex loci* merely permissible. The article itself was dropped at the last moment because it was feared that its sweeping generality and laconic form might prove an embarrassment to the courts. The other articles, however, have found a place in the Code. In interpreting Art. 999, the courts have found no difficulty in allowing Frenchmen abroad to execute their wills either according to the local law or according to French law.¹⁷⁰ As to foreigners executing their wills in France, it was held, on the other hand, following the doctrine of *In re Pommereuil*, that their wills must conform to French law.¹⁷¹ In the recent case of *Gesting v. Viditz*,¹⁷² the *Chambre de Requête*s reached a different conclusion, hold-

167. In these jurisdictions universal succession prevails. The testator is regarded as disposing of a *universum jus* and not as conferring an immediate right to property, movable or immovable. See Bar, *Private International Law* (Gillespie's transl.), 501 n.

168. For a comparative statement of the law of other countries see in general Contuzzi, *Il Codice Civile nei rapporti del diritto internazionale privato*, II, 458-519; Contuzzi, *Diritto internazionale privato*, 299-385; Neumann, *Internationales Privatrecht*, 194-203. For the older law, see Foelix, *Traité de droit international privé*, I, 186-196. As to wills, see Contuzzi, *Diritto ereditario internazionale*, 60-141, 151-210.

169. For the history of the article, see Fenet, *Recueil complet des travaux préparatoires du Code Civil*, II, 6; Merlin, *Répertoire*, *Loi*, Sec. 6, Nos. 7 and 8; Lainé, *Revue*, III, 857-866; *Revue*, I, 456-475. As to French law preceding the present Civil Code, see Febvre, *De la forme des actes* (thesis), 93-106.

170. Cass. (*Req.*), July 3, 1854, P. 1856, 2, 171; Cass. (*Req.*), Aug. 19, 1859, P. 1859, 64.

171. Cass., Aug. 25, 1847, S. 1847, 1, 712; Cass. (*Req.*), March 9, 1853, D. 1853, 1, 217; App. Paris, June 21, 1850, P. 1850, 2, 187. *Contra*: Trib. Sup. de Papeete, Sept. 22, 1898, *Journal*, XXVI, 595; App. Rouen, May 7, 1898, *Journal*, XXVI, 578.

172. *Journal*, XXXVI, 1097. Concerning this case see *The Law Magazine and Review*, XXXV, 34-42.

ing that it was the intention of the framers of the Code to overthrow the doctrine introduced by the Parliament of Paris in *In re Pommereuil*. The present law of France may thus be said to sanction the general rule that a will, whether executed by a French subject or a foreigner, may, as regards form, comply with the provisions of the *lex loci* or with those prescribed by his national law. This rule seems to apply to wills disposing of movables or immovables. A will disposing of immovables will probably be valid also if it is executed in conformity with the law of the situs of the property,¹⁷³ and a will disposing of movables if it satisfies the requirements of the *lex domicilii*.

The rule *locus regit actum* is applicable to the formal validity of contracts in general, including bills and notes.¹⁷⁴ It is said to apply also to contracts relating to immovables and to transfers of immovables except as to recording and matters directly affecting the property régime.¹⁷⁵ An option is allowed in the case of contracts between the *lex loci* and the national law, if common to the parties,¹⁷⁶ and, in the case of transfers of, or of contracts relating to, immovables, between the *lex loci* and the *lex rei sitae*. Whether the courts will allow a greater selection is uncertain. By an express provision of the Civil Code (Art. 2128), based, it would seem, upon a legislative mistake,¹⁷⁷ the *lex rei sitae* is made obligatory with respect to the execution of mortgages on immovables situated in France.

Where a will has been executed in accordance with the *lex loci* (French law) and the national law of the testator has

173. *Trib. Civ. Seine*, Dec. 23, 1881, *Journal* IX, 322; *App. Aix*, July 11, 1881, S. 1883, 2, 249; *Trib. Sup. Papeete*, Sept. 22, 1898, *Journal*, XXVI, 595.

174. *App. Besançon*, Jan. 5, 1910, *Revue*, VI, 428.

175. *Audinet*, *Principes élémentaires du droit international privé* (2d ed.), 355; *Cohendy*, D., 1892, 1, 474 n.; *Despagnet*, *Précis de droit international privé* (4th ed.), Nos. 216, 217; *Foelix*, *Traité de droit international privé*, I, Nos. 76, 84; *Milhaud*, *Principes de droit international privé dans leur application aux privilèges et hypothèques*, 244-294; *Pillet*, *Principes de droit international privé*, 475-476 n.; *Surville et Arthuys*, *Cours élémentaire de droit international privé* (3d ed.), 235; *Vincent & Pénaut*, *Dictionnaire de droit international privé, Formes des Actes*, No. 20.

176. There is much difference of opinion among the French authors in regard to the application of the rule *locus regit actum* to contracts. See *Audinet*, *Principes élémentaires du droit international privé* (2d ed.), No. 354; *Fuzier-Herman*, *Répertoire, Forme des Actes*, Nos. 62, 73; *Huc*, *Code Civil*, I, 161; *Massé*, *Le droit commercial dans ses rapports avec le droit des gens et le droit civil*, I, Nos. 572, 573, 574, 579; *Vincent & Pénaut*, *Dictionnaire de droit international privé, Forme des Actes*, Nos. 33-36; *Weiss*, *Traité théorique et pratique de droit international privé*, IV, 325-327.

177. *Febvre*, *De la forme des actes* (thesis), 169-172; *Pillet*, *Résumé du cours*, 342.

expressly prohibited the use of such form by its subjects abroad, French courts will not give effect to the prohibition, but will uphold the will.¹⁷⁸

Whether the above rules are to be understood in a *renvoi* sense is undecided.¹⁷⁹

Italy. Art. 9 of the Preliminary Dispositions of the Italian Civil Code provides: "The extrinsic forms of acts inter vivos and of last will are determined by the law of the place in which they are made. It is within the power of the testator or of the contracting parties, however, to follow the form of their national law, provided it be common to all of the parties."¹⁸⁰

The rule *locus regit actum* accordingly is obligatory, with an exception in favor of the law of nationality. A will is valid, irrespective of the nature or the situs of the property disposed of, if it complies with the *lex loci* or with the national law of the testator.¹⁸¹ A contract is valid, as regards form, if it satisfies the *lex loci* or the national law common to the parties.¹⁸²

178. *App. Orléans*, Aug. 4, 1859, S. 1860, 2, 37. Contra: *Trib. Civ. Seine*, Aug. 13, 1903, *Journal*, XXXI, 166. See also *Baudry-Lacantinerie*, I, 180; *Despagnet, Précis de droit international privé* (4th ed.), 474; *Labbé*, S. 1883, 2, 250; *Laurent, Droit civil international*, VI, No. 419.

179. *The Civil Tribunal of Tunis* (March 25, 1890, *Journal*, XVIII, 238) applied *renvoi* to the form of a donation. The question does not seem to have been presented to the higher courts of France. For a discussion of the French cases relating to *renvoi* in general see *Lorenzen, The Renvoi Theory and the Application of Foreign Law, Col. Law Rev.*, X, 191-192. The French court of Cassation has recently reaffirmed the doctrine of the *Forgo* case which introduced the *renvoi* doctrine into France. See *Cass. (Req.)*, March 1, 1910, *Journal*, XXXVII, 888. If the doctrine should be limited to cases governed by the national law *renvoi* might become applicable to the formal validity of legal acts in so far as they depend upon the national law of the parties.

180. For the history of this provision see *Buzzati, L'Autorità delle leggi straniere relative alla forma degli atti civili*, 170-171; *Esperson, Journal*, IX, 157-160; *Lomonaco, Trattato di diritto civile internazionale*, 192-194.

With regard to commercial obligations the Commercial Code, Art. 58, contains the following:

"The form and essential conditions of commercial obligations, the form of acts required for the exercise and preservation of rights springing therefrom and for their execution, as well as the effect of the acts themselves, shall be governed by the laws and usages of the place where said acts take place or are to be performed, reserving in all cases, however, the exceptions established by article 9 of the Preliminary Dispositions of the Civil Code with respect to persons subject to the same national law."

181. See *Cass. Turin*, May 31, 1881; *Monitore*, 1881, 673; *App. Lucca*, June 23, 1881; *Annali*, 1882, III, 408.

182. See *Cass. Turin*, Jan. 13, 1891; *Monitore*, 1891, 189. See also *Buzzati, L'Autorità delle leggi straniere relative alla forma degli atti civili*, 352-354. *Enciclopedia Giuridica Italiana, Atti all'estero*, 35-36; *Fiore, Elementi di diritto internazionale privato*, Sec. 33.

Art. 1314 of the Civil Code requiring under the penalty of nullity all agreements for the transfer of immovables to be in writing, is held to be obligatory upon Italians as well as upon foreigners. The instrument itself may be executed in the form customary in the place of execution.¹⁸³ The same rule probably applies to mortgages on Italian immovables.¹⁸⁴

The Italian courts will recognize an express provision of the national law of a party forbidding the execution of an act in the form authorized by the *lex loci* and will hold such an act void.¹⁸⁵

As the *renvoi* doctrine has found no place in Italian jurisprudence the above rules are to be understood as referring to the territorial law of the foreign state or country, exclusive of the rules relating to Private International Law.¹⁸⁶

Spain. The Spanish Code provides in Art. 11: "The forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed."

The *lex loci* is obligatory and compliance with some other law, in the matter of form, is not allowed.¹⁸⁷

Germany. Art. 11 of the Law of Introduction of the German Civil Code¹⁸⁸ lays down the following rule in paragraph 1, sentence 1: "The form of a juristic act is determined by the law governing the legal relation forming the object of the juristic act."

183. See Diena, *I diritti reali considerati nel diritto internazionale privato*, 89-93; Buzzati, *L'Autorità delle leggi straniere relative alla forma degli atti civili*, 139-142, 355-361; Fiore, *Elementi di diritto internazionale privato*, 418; *Enciclopedia Giuridica, Italiana, Atti all' estero*, 36; Esperson, *Journal*, IX, 160.

So as to power of attorney relating to immovables in Italy. *Cass. Turin*, Aug. 24, 1892; *La Legge*, 1892, 2, 588; *App. Palermo*, Oct. 6, 1894, *Journal*, XXIII, 910. *Contra: Cass. Rome*, March 21, 1887; *La Legge*, 1887, 2, 509.

184. See Art. 1978, Civil Code.

185. *Cass. Turin*, April 12, 1892; *Monitore*, 1892, 346. See also Buzzati, *L'Autorità delle leggi straniere relative alla forma degli atti civili*, 423; *Enciclopedia Giuridica Italiana, Atti all' estero*, 35.

186. *Cass. Rome*, Jan. 5, 1906, and *Rome*, Dec. 1, 1906, *Journal XXXIV*, 1205.

187. Alcubilla, *Diccionario de la administracion española*, IV, 83-84; Bravo, *Derecho internacional privado*, I, 109-110; Robles Pozo, *Código Civil*, I, 122-123, Sanchez Roman, *Estudios de derecho civil*, II, 331; Scaevola, *Código Civil*, I, 279; Torres Campos, *Elementos de derecho internacional privado*, 244-245, 275.

188. For the history of this article see Mugdan, *Die gesammten Materialien zum bürgerlichen Gesetzbuch für das deutsche Reich*, Vol. I, pp. XLV, 272-275. For the law prior to the adoption of the Civil Code, see Niemeyer, *Das in Deutschland geltende internationale Privatrecht*, 75-103.

Paragraph 2 of the same article prescribes this rule absolutely for the creation or transfer of real rights.¹⁸⁹ In regard to all other acts an exception to the general rule is authorized by sentence 2, of paragraph 1, according to which "compliance with the laws of the place at which the legal transaction is entered into is sufficient."

Paragraph 2 does not say that if the law of the situs of the property should allow the creation of real rights in such property by the mere agreement of the parties the *lex loci* will not be applicable to the agreement, nor that executory contracts relating to land shall be governed by the law of the situs. Both questions will have to be answered by the German courts in the light of the general principles underlying the Conflict of Laws laid down in the Civil Code.¹⁹⁰

189. In order to appreciate the real import of the German provision it is necessary to bear in mind that under German law, contrary to the law of England, the United States, France and Italy, the agreement of the parties does not operate as a transfer of property rights. For the transfer of title, a so-called *real* contract (*dinglicher Vertrag*), which, in the case of personal property, consists in the delivery of the article, and, in the case of realty, in its *Auflassung*, is required. These acts in the nature of things must be done at the situs and must conform to its law.

"In so far, however, as public instruments are necessary for the transference of real rights in immovables," says Bar, "these may, according to the general rule, be executed in a foreign country, and then as regards their form the rule '*locus regit actum*' will apply." Bar, *Private International Law* (Gillespie's transl.), Sec. 227.

190. One or two cases before the adoption of the present Civil Code held that the *lex rei sitae* would govern the formal validity of contracts for the sale of immovables. *Oberhofgericht Mannheim*, Feb. 1, 1866, *Seuffert's Archiv*, XXII, No. 204; OAG Lübeck, Dec. 30, 1839; *Seuffert's Archiv*, VIII, No. 2. This view was expressly sanctioned by the Prussian law (A. L. R., I, 5, Sec. 115). The Imperial Court seems inclined to adopt this view under the present Civil Code. It held in a recent case (RG LXIII, 18, March 3, 1906) that Sec. 313 of the Civil Code was not applicable to a contract made in Germany for the sale of foreign realty. The case did not call for a decision of the question whether the *lex rei sitae* was imperative nor whether a contract made abroad with reference to German realty must conform to German law. The only point decided was that such a contract *may* conform to the *lex rei sitae*. The court, by way of dictum, suggested, however, that the *lex rei sitae* governs absolutely, observing that, while the legislator had not in express terms prescribed the application of the *lex rei sitae* to executory contracts, an intention so to do could be gathered from sentence 1, par. 1, of Art. II. See note to case in *Zeitschrift*, XVI, 331.

The German jurists are generally agreed that a contract to sell land should be sufficient as to form if it satisfies the *lex loci*. Bar, *Private International Law*, Sec. 228; Barazetti, *Das internationale Privatrecht im bürgerlichen Gesetzbuch*, 54; Dernburg, *Das Bürgerliche Recht*, I, 109; Gierke, *Deutsches Privatrecht*, I, 231 n. 61; Keidel, *Journal*, XXVI, 45; Savigny, *Conflict of Laws*, Sec. 381; *Zeitschrift*, XVI, 331. *Contra*: Endemann, *Lehrbuch des Bürgerlichen Rechts* (9th ed.), I, 99 n., 21.

Wills disposing of either movables or immovables may, as regards form, comply with the *lex loci* or with the national law of the testator at the time of the execution of the will.¹⁹¹ A will validly executed according to either of these laws will not be invalidated by a subsequent change of nationality.¹⁹²

Contracts may conform to the law of the state with reference to which the parties must be deemed to have contracted,¹⁹³ or to the *lex loci contractus*.¹⁹⁴ Art. 85 of the Bills of Exchange

A contract intended to create a *real* right but not complying with the *lex rei sitae* may be binding as an obligatory contract under the *lex loci*. Bar, *Private International Law*, Sec. 228; Crome, *System des deutschen bürgerlichen Rechts*, I, 147.

191. Art. 24, par. 3, *Law Introduction Civil Code*; Rundstein, *Archiv für Bürgerliches Recht*, XX, 198.

192. While par. 3 is framed especially with regard to Germany, it embodies in fact a general principle. Planck, *Bürgerliches Gesetzbuch* (3d ed.), VI, 94.

193. The present Code contains no provisions relating to the law governing the validity of contracts. The Imperial Court has since the adoption of the Code followed its former practice, holding that the intention of the parties shall control and that in case of doubt, the parties shall be deemed to have contracted with reference to the law of the place of performance. RG XLIII, 156 (Jan. 16, 1899); RG LIV, 311 (April 23, 1903); RG LXXIII, 379 (April 19, 1910). In favor of the *lex domicilii*, see RG LXI, 343 (Oct. 12, 1905).

Under what circumstances a bilateral contract which does not comply, as regards form, with the *lex loci* will be valid, is not settled. German courts tend to divide a bilateral contract into two unilateral obligations which may be governed by different laws. See RG LXVIII, 203 (April 4, 1908); RG, Jan. 21, 1908, *Juristische Wochenschrift*, XXXVIII, 192; RG LI, 218 (April 21, 1901); RG XLVI, 193 (April 28, 1900); RG XXXIV, 191 (Oct. 13, 1884); Bar, *Private International Law* (Guthrie's transl.), Sec. 123.

194. Where the contract is entered into by correspondence the older doctrine was that the law of the place where the acceptance was mailed should be regarded as the *lex loci* of the contract. Savigny, *Conflict of Laws*, 214. The modern German jurists agree in holding that it is improper to assign to such a contract a fictitious situs in either of the states concerned, the contract having as close a connection with the law of the state of the offeror as it has with that of the state of the offeree. Unless the contract satisfies the formal requirements of the law otherwise applicable to the contract it is necessary under this view that it comply with the law of both countries. See Aman, *Über die Bedeutung und Tragweite der Regel "locus regit actum" im internationalen Privatrecht* (thesis), 14; Bar, *Private International Law* (Guthrie's transl.), Sec. 125; Barazetti, *Das internationale Privatrecht des bürgerlichen Gesetzbuches*, 54-55; Böhm, *Die räumliche Herrschaft der Rechtsnorm*, 101; Crome, *System des bürgerlichen Rechts*, I, 146, n. 31; Endemann, *Lehrbuch des bürgerlichen Rechts*, I (9th ed.), 97, n. 13; Niemeyer, *Vorschriften u. Materialien zur Kodifikation des internationalen Privatrechts*, 100; Planck, *Bürgerliches Gesetzbuch* (3d ed.), VI, 45; Regelsberger, *Pandekten*, I, 171; Rundstein, *Archiv für bürgerliches Recht*, XX, 202; Staudinger, *Kommentar zum bürgerlichen Gesetzbuche* (2d ed.), VI, 43; Zitelmann, *Internationales*

Act, which is not superseded by Art. 11 of the Law of Introduction to the Civil Code,¹⁹⁵ does not allow such an option with respect to bills and notes. The *lex loci* is made compulsory by this article with the qualifications: (1) that where a bill or note, issued out of Germany, or any supervening contract placed thereon out of Germany, conforms as regards requisites of form to German law, such note or contract shall be treated as valid with respect to all who become parties to such a bill or note in Germany; (2) that where the parties to a bill or note executed without Germany are Germans, compliance with German law shall be sufficient.

The question whether the German courts will recognize the superior authority of the law governing the validity of the legal act in general so as to allow it to forbid the execution of the instrument in accordance with the forms prescribed by the *lex loci* is not yet determined.¹⁹⁶

Renvoi, which is sanctioned by the German legislator in certain cases, is inapplicable to the rules governing matters of form except perhaps where the law of nationality intervenes.¹⁹⁷

IV

Two principal questions are suggested by the preceding comparison of the law of England, the United States, France, Italy, Spain and Germany.

Privatrecht, II, 163-164; Stobbe, *Handbuch des deutschen Privatrechts* (3d ed.), I, 260-261.

In case of unilateral obligations the contract will be deemed valid if it complies with the national law of the obligor. Bar, *Private International Law* (Guthrie's transl.), Sec. 125; Gierke, *Deutsches Privatrecht*, Sec. 26, n. 62; Regelsberger, *Pandekten*, I, 171; Stobbe, *Handbuch des deutschen Privatrechts* (3d ed.), I, Sec. 33, n. 10. The Prussian law provided that the law of the domicile of the party which would validate the contract should govern. A. L. R., I, 5, Secs. 113, 114. A recent case decided by the Imperial Court shows its inclination to follow the older view, viz., the law of the state in which the offer is accepted. RG, Feb. 2, 1906, *Zeitschrift*, XVI, 326.

195. Aman, *Über die Bedeutung und Tragweite der Regel "locus regit actum" im internationalen Privatrecht* (thesis), 15.

196. See Bar, *Private International Law* (Guthrie's transl.), Sec. 370; Bar, *Holtzendorff's Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler), II, 37; Kahn, *Ihering's Jahrbücher für die Dogmatik*, XXX, 49-53.

197. Aman, *Über die Bedeutung und Tragweite der Regel "locus regit actum" im internationalen Privatrecht*, 21-24; Niedner, 31, 33 (in 45 *Gruchot's Beiträge zur Erleuterung des deutschen Rechts*, XLV, 696); Rundstein, *Archiv für bürgerliches Recht*, XX, 202.

The German Bar Association has placed itself on record as opposed to *renvoi* in connection with the law of obligations. *Verhandlungen des 24 deutschen Juristentages*, IV, 127.

1. Which is the law governing upon principle, wills, deeds, and contracts in the matter of formal requirements?

2. Is it practicable and, if so, to what extent, to allow the parties a choice in this regard between different laws?

In regard to the first question there are two views: (1) the view adopted by France, Italy and Spain, that the *lex loci* is the governing law; (2) the view adopted by Germany, England and the United States, that the law applicable to the validity of the transaction in general shall control. Upon principle it would seem that the latter view is correct. A requisite of form prescribed for the existence of a legal act is an element entering into its validity, which in the nature of things should be governed by the law determining the validity of the act in other respects. Savigny¹⁹⁸ was the first writer to lay down this rule. He says: "What local law is applicable to the particular legal act in respect to its form? From this alone, in many instances, is the validity or invalidity of the act to be discovered.

"If we consider this question from the general point of view, from which the whole foregoing inquiry has been conducted, we can hardly hesitate as to the answer. We must, as it seems, judge of the requisite forms according to that local law to which the juridical act is itself subject according to the rules already laid down."

The same view is supported by a consensus of juristic opinion in Germany and by a considerable number of jurists in other countries.¹⁹⁹

Against the above view the general argument may be advanced, that with the development of the science of Private International Law there is a tendency to separate certain elements entering into the validity of a legal transaction and to subject them to a law of their own, and that in accordance with

198. *Private International Law* (Guthrie's transl.), Sec. 381.

199. Algara, *Lecciones de derecho internacional privado*, 193; Bar, *Private International Law* (Guthrie's transl.), Sec. 123; Böhm, *Die räumliche Herrschaft der Rechtsnorm*, 18; Crome, *System des deutschen bürgerlichen Rechts*, I, 146; Dernburg, *Das bürgerliche Recht*, I, 109; Dernburg, *Pandekten*, I, 46; Dreyfus, *L'acte judiciaire en droit privé international* (thesis), 193-197; Eichhorn, *Einleitung in das deutsche Privatrecht* (4th ed.), 109; Gerber, *Deutsches Privatrecht* (8th ed.), 78; Gierke, *Deutsches Privatrecht*, I, 230; Haus, *Du droit privé qui régit les étrangers en Belgique*, 240-241; Meili, *Das Internationale Civil- und Handelsrecht*, I, 202-204; Niemeyer, *Vorschriften, Materialien zur Kodifikation des internationalen Privatrechts*, 96; Picard, *Journal*, VIII, 468-469; Regelsberger, *Pandekten*, I, 170; Stobbe, *Handbuch des deutschen Privatrechts* (3d ed.), I, 248; Unger, *System des österreichischen allgemeinen Privatrechts* (5th ed.), II, 206, 209; Wächter, *Archiv für die civilistische Praxis*, XXV, 368-380; Windscheid, *Pandekten*, I, Sec. 35; Wyss, *Zeitschrift für schweizerisches Recht*, II, 97-98; Zavala, *Elementos de derecho internacional privado*, 122-125.

such tendency the formality of a legal transaction, like capacity, might be placed under a distinct law. That such a view should find support in countries in which capacity has been raised to a status fixed by the party's national law, or law of domicile, regardless of the law otherwise governing the legal act, is natural. The most thorough attempt to justify this view upon principle has been made by Buzzati.²⁰⁰ He regards all laws concerning the form of acts as relating to the morals, the religion, the political and the economic interests of the country in which they are done and to be laws of public order, binding upon all parties within the jurisdiction.²⁰¹ This conception of the fundamental nature of the formal requirements of legal acts may be true in particular classes of cases, but it cannot be supported as a general proposition. Of what possible interest, for example, can it be to a state in which a testator is not domiciled, and in which he leaves no property, whether a will executed within its territory is subscribed by two or by three attesting witnesses, before one notary and two attesting witnesses or before two notaries? Nor can it be contended that the local law must be followed in the interest of the party and his family, for the local law may actually furnish less guaranty that the act in question represents the free expression of the party's will than if the law governing the transaction in general had been followed.

Most authors do not attempt to justify the rule *locus regit actum* upon principle, but base it upon mere tradition or upon grounds of utility.²⁰² They are generally of the opinion that the rule is not obligatory, so that the parties may follow some other law. Most French and Italian authors restrict the option allowed to the *lex loci* and the national law of the parties, excluding the law governing the validity of legal acts in other respects. In so doing they depart both from principle and from the true historical basis of the rule *locus regit actum*. Were the utmost freedom permissible in the matter of form, no fault could be found with the view that the parties might choose, among others, the form sanctioned by their personal law (*lex patriae* or *lex domicilii*).²⁰³ But no valid reason, it is submitted,

200. *L'Autorità delle leggi straniere relative alla forma degli atti civili*, Turin, 1894.

201. Pages 118 and 119.

202. See Audinet, *Principes élémentaires du droit international privé* (2d ed.), 261; Pillet, *Résumé du cours*, 343.

203. "This competence (*lex patriae*)," says Pillet, "it must be admitted, is not so clear in the present case as it is in other branches of the law, but the protective character of laws of this sort is sufficiently marked to permit a subject to take advantage of them abroad." *Principes de droit international privé*, 486.

exists for a substitution of the national law of the parties for that governing the legal act in general.

The rule that legal transactions as to form are subject to the law governing the validity of the transaction in other respects is thus the only one resting upon a scientific basis. The German legislator deserves credit for having established this principle in the Civil Code.²⁰⁴

The question remains: To what extent, if any, should compliance with a law other than that governing the validity of the transaction in general be deemed sufficient? The common law of England and of the United States, if we leave out of consideration the cases relating to procedure, recognizes, as we have seen, no clear exception to, or qualification of, the general rule. Statutes, however, have modified the common law rule in the matter of wills, and in several of the United States also with respect to the transfer of immovables. Let us consider the extent to which such legislation may properly go.

All elements of a legal transaction affecting its validity, including provisions relating to its form, are fixed by law. Parties to the transaction have no choice in the matter. Upon principle, therefore, only one law should govern the validity of legal transactions in the matter of form. An exception to this rule has been recognized on the continent of Europe, however, on grounds of necessity, so that an act executed in the form prescribed by the *lex loci* might be valid everywhere. Without such a concession a person living in a foreign country may be actually deprived of his right to dispose of his property by will, and subjected to great inconvenience and loss in connection with other legal acts. In view of the fact that the rules in the Conflict of Laws are designed to facilitate international relations compliance with the *lex loci* should, as far as practicable, be allowed. The expediency and justice of allowing parties to comply with the *lex loci* is attested by the sanction which the rule *locus regit actum* has received in many countries by legislation²⁰⁵ and its acceptance by practically all jurists.²⁰⁶

204. Japan has followed the German example in its *Law of Ho-rei*, June 15, 1898 (Art. 8). See Yamada, *Journal*, XXVIII, 636.

205. See Contuzzi, *Il Codice Civile nei rapporti del diritto internazionale privato*, II, 458-519; Contuzzi, *Diritto internazionale privato*, 299-385; Contuzzi, *Diritto ereditario internazionale*, 60-141, 151-210; Neumann, *Internationales Privatrecht*, 194-203; Foelix, *Traité de droit international privé*, I, 186-196.

An option between the *lex loci* and the national law is sanctioned also by Art. 3 of the Convention of the Hague, relating to wills, of July 17, 1905.

In the United States there is precedent for the introduction of an option in regard to a matter affecting the validity of a legal transaction.

The prevailing doctrine relating to the defence of usury is that the parties may contract either with reference to the law of the place in which the contract is executed, or with reference to the law of the place in which the contract is to be performed, or even with reference to the law of some third state with which the contract has a direct relation. *Andrews v. Pond*, 13 Pet., 65 (1839); *Miller v. Tiffany*, 1 Wall., 298 (1863); *Arnold v. Potter*, 22 Ia., 194 (1867); *Scott v. Perlee*, 39 Oh. St., 63 (1883); see *Akers v. Demond*, 103 Mass., 318 (1869).

206. The following jurists are in favor of allowing such an option: Alcorta, *Curso de derecho internacional privado*, I, 259; Algara, *Lecciones de derecho internacional privado*, 193; Antoine, *De la sucession légitime et testamentaire en droit international privé*, 112; Audinet, *Principes élémentaires du droit international privé*, No. 628; Aubry et Rau, *Cours de droit civil français* (5th ed.), I, Sec. 31; Baudry-Lacantinerie et Colin, *Des donations entre vifs et des testaments* (2d ed.), X, 176; Baudry-Lacantinerie et Houques-Fourcade, *Des Personnes* (2d ed.), I, No. 227; Bar, *Private International Law* (Guthrie's transl.), Sec. 123; Bard, *Précis de droit international*, 271; Baudouin, *Journal*, XXXVI, 1098-1131; Bilciuresco, *De la forme des actes en droit international privé* (thesis), 30-43; Bevilacqua, *Principios elementares de direito internacional privado*, 187; Brocher, *Cours de droit international privé*, I, 134; Claro, *D.*, 1899, 2, 177; Colin, *Journal*, XXIV, 941; Despagnet, *Précis de droit international privé* (4th ed.), No. 217; Diena, *I diritti reali considerati nel diritto internazionale privato*, 94-95; Durand, *Essai de droit international privé*, 246-248; Dernburg, *Pandekten* (7th ed.), I, 105; Esperson, *Journal*, IX, 156; Fiore, *Elementi di diritto internazionale privato*, 415-417; Fiore, *Diritto internazionale privato* (4th ed.), I, 231-233; Fiore, *Le droit international privé* (4th ed.), 250-253; Foelix, *Traité de droit international privé*, I, No. 83; Fuzier-Herman, *Répertoire, Forme des actes*, No. 63; Gierke, *Deutsches Privatrecht*, I, 230-231; Haus, *Du droit privé qui régit les étrangers en Belgique*, 240; Huc, *Code Civil*, I, No. 170; Labbé, *S.* 1883, 2, 250 n.; Lainé, *Revue*, III, 866-872; Laurent, *Droit civil international*, II, No. 238. (According to Laurent the rule *locus regit actum* is not applicable to solemn acts—see II, No. 240); Lomonaco, *Trattato di diritto internazionale*, 192; *La massima "locus regit actum" in tema di atti solenni*, in *Rivista di diritto internazionale e di legislazione comparata*, I, 5; Massé, *Le droit commercial dans ses rapports avec le droit des gens et le droit civil*, I, Nos. 571, 572; Meili, *Das internationale Civil- und Handelsrecht*, I, 205; Milhaud, *Privilèges et hypothèques en droit international privé*, 247-248; Neumann, *Internationales Privatrecht*, 68; Niemeyer, *Vorschriften u. Materialien zur Kodifikation des internationalen Privatrechts*, 94-99; Naquet, *La règle "locus regit actum" est-elle impérative ou facultative*, *Journal*, XXXI, 39-58; S., 1903, 1, 73; Picard, *Journal*, VIII, 468; Pillet, *Principes de droit international privé*, 473; Pillet, *Résumé du cours*, 337-346; Pimenta Bueno, *Direito internacional privado e applicação de seus principios com referencia ás leis particulares do Brazil*, 107; Regelsberger, *Pandekten*, I, 170; Rivier, in Asser & Rivier, *Éléments du droit international privé*, No. 30 n.; Rolin, *Principes du droit international privé*, I, 367; Savigny, *Conflict of Laws*, Sec. 331; Surville et Arthuys, *Cours élémentaire de droit international privé* (3d ed.), No. 206; Surville, *La règle "locus regit actum" et le testament*, *Journal*, XXXIII, 961-976; Stobbe, *Handbuch des deutschen Privatrechts* (3d ed.), 1, 248-251; Torres Campos, *Elementos de derecho internacional privado*, 244, 245, 275; Unger, *System des österreichischen allgemeinen Privatrechts* (5th ed.), I, 207; Vincent & Penaud, *Dictionnaire de droit international privé, Forme des Actes*, Nos. 32-52; Vareilles-Sommières,

There would appear to be no sufficient reason why the rule *locus regit actum*, with certain provisos, should not be adopted by legislation with regard to the formal execution of contracts, wills, and deeds. There can be no doubt as to contracts. A contract should be valid as regards form in every jurisdiction, if it satisfies the requirements of the *lex loci*. If under the view prevailing in the Conflict of Laws of the forum another law governs the validity of the contract in general, compliance with the formal requisites of such law should be sufficient. An exception should be made with respect to commercial paper.²⁰⁷ The nature of the instrument is here essentially dependent upon its form. Absolute certainty in regard to its character is of the utmost importance. A fixed rule must therefore apply, which in the nature of things, is the law of the place of issue. The qualifications contained in the English Bills of Exchange Act might properly be followed.²⁰⁸

Nor can there be doubt as to wills disposing of personal property. Compliance with the *lex loci* should be allowed whether the will be executed in one of the United States or in a foreign country, provided the will be in writing and subscribed by the testator. The limitation of the rule *locus regit actum* to cases where the testator is a non-resident of the state, contained in the statutes of some states, rests upon no solid foundation.

La Synthèse du droit international privé, I, Nos. 106, 107 (optional as to subjects abroad; imperative as to foreigners); Weiss, *Manuel de droit international privé* (6th ed.), 382; Weiss, *Traité théorique et pratique de droit international privé*, III, 107; Wächter, *Archiv für die civilistische Praxis*, XXV, 368-380; Windscheid, *Pandekten* (7th ed.), I, 84; Zitelmann, *Internationales Privatrecht*, II, 143 fg.

The following authors maintain the view that compliance with the *lex loci* in the matter of form is compulsory: Asser, *Schets van het internationaal Privaatrecht*, No. 30; Asser & Rivier, *Éléments du droit international privé*, No. 30; Duguit, *Conflits de législation relatifs à la forme des actes*, 55-56, 223-224; Febvre, *De la forme des actes en droit international privé*, 161; Gentile, *Delle Donazione per diritto privato internazionale*, I, 121-123; Napolitani, *La Massima "locus regit actum"*, 19; Olivi, *Etude sur la théorie de l'autonomie en droit international privé*, 245. Pavala holds that the law otherwise applicable should govern, allowing no option in favor of the *lex loci*. *Elementos de derecho internacional privado*, 122-125.

207. See Ottolenghi, *La cambiale nel diritto internazionale*, 52.

208. "(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

"(b) Where a bill issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom." (Sec. 72.)

A reasonable doubt may be felt in regard to the extension of the rule *locus regit actum* to contracts affecting land and to transfers of land. Story considered the objections to the application of the *lex loci* in this class of cases as insuperable. He says: "They seem wholly to have overlooked, on the other side, the inconvenience of any nation suffering property, locally and permanently situate within its own territory, to be subject to be transferred by any other laws than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws, to regulate its own titles to such property, many of which laws can be but imperfectly ascertained, and many of which may become matters of subtle controversy."²⁰⁹ These objections are clearly inapplicable to deeds or wills executed in one of the United States, or in countries in which the law of real property and the modes of conveyancing are substantially identical with those obtaining at the situs. As to these, certainly the *lex loci* could be safely adopted. Nor would the adoption of this rule for wills executed in foreign countries result in serious inconvenience. Self-interest would prompt parties residing abroad to execute their wills relating to such property in the form prescribed by the law of the situs in all cases where it is practicable for them to do so. Recourse to the local law would be had only in rare cases of extreme necessity.

Similar considerations would suggest that the *lex loci* should be adopted also with regard to deeds. According to Foote, the doctrines of the common law governing the transfer of realty resulted, not so much from the fear of difficulties in the interpretation of foreign wills or deeds, as from its "spirit of exclusion which has applied the *lex situs* in England to every conceivable question affecting the soil."²¹⁰ Notwithstanding the fact that the reasons of necessity advanced for the adoption of the *lex loci* in regard to wills are less strong in the case of conveyances *inter vivos*, it would seem that the liberal policy of allowing the formal execution in accordance with the *lex loci*, which has been adopted by Illinois, Kansas, Michigan, Minnesota, Nebraska, Ohio, Oregon, Vermont, and Wisconsin,²¹¹ should be approved. In the case of both wills and deeds, the legislator should require the instrument to be in writing. In the case of deeds he should further require that the signature be acknowledged before a proper officer.

There is no reason why in certain cases the legislator should

209. Story, *Conflict of Laws* (8th ed.), Sec. 440.

210. Foote, *Private International Jurisprudence* (3d ed.), 377.

211. *Supra*, n. 70-78.

not go beyond the views above expressed and allow compliance with the *lex domicilii* and the *lex fori*. Following the example of Lord Kingsdown's Act, compliance with the *lex domicilii* of the testator at the time of the execution of the will may very well be regarded as sufficient for the formal validity of a will disposing of movable property. As far as the *lex fori* is concerned, we have seen that in England and in some of the United States, the statute of frauds of the forum is held to apply to contracts executed in another jurisdiction, on the theory that the requirement of form relates merely to the evidence of the contract. From the standpoint of the Conflict of Laws, this doctrine is unfortunate since it makes the enforceability of the contract dependent upon the law of the place in which plaintiff may happen to bring the suit. The doctrine can be sustained, of course, on the theory that the statute of frauds of the forum establishes a rule of public policy to which all foreign acts must yield. It would have been preferable had our courts held that the statute of frauds did not establish such a policy and was applicable only to contracts executed within the enacting state. A change in our law in this sense by legislation is desirable.

In another direction the *lex fori* could properly be given a wider application. The legislative purposes underlying the provisions as to form are various. In the case of contracts and wills disposing of movables, the principal object would seem to be to furnish a certain guaranty that the act in question is the deliberate and voluntary act of the party. In the case of dispositions of realty *inter vivos* or by will, on the other hand, security of title to land plays a prominent part. Whenever the requirements of form rest essentially upon considerations of the former sort, there is no good reason why a transaction should not be sustained if it satisfies the *lex fori*. Whenever an act complies with the formalities required by his own legislator, the judge of the forum must regard it as the deliberate, voluntary, and binding act of the party.²¹² If the formal validity of a legal transaction in the Conflict of Laws is not to be tested by a single law, it would seem that the *lex fori* has a strong claim to consideration in this class of cases. The statutes in several of the United States, providing that a will shall be entitled to probate if it is executed in the form prescribed by the *lex fori*, are in harmony with this view. It is far better that a legislator

212. Lainé was the first jurist to advance the theory that an act should be regarded as valid as regards form if it satisfied the *lex fori*. *Journal*, XXXV, 681-685; see also, Pillet, *Principes de droit international privé*, No. 263.

shall lay down the most liberal rules with respect to mere matters of form in the Conflict of Laws, than that courts, as a result of too stringent rules, should attempt to sustain legal transactions by resorting to the *renvoi* doctrine. The rules relating to form, like all the other rules in the Conflict of Laws, designate the territorial law of the country referred to, and not the foreign law in its totality inclusive of its rules relating to the Conflict of Laws.²¹³ When the law of a state or country (*lex fori*) prescribes certain rules which shall govern the formal validity of legal transactions in the Conflict of Laws, they will be binding upon the judge of the forum, notwithstanding contrary provisions in the Private International Law of the country to which the *lex fori* refers.

The results of this study in regard to the formal validity of contracts, deeds, and wills may be summarized as follows:

1. The rule of the English and American courts that the Statute of Frauds applies to foreign contracts should be modified, because it is unjust and is not required by paramount considerations of policy.

2. The view sustained by the English and American cases that the law otherwise determining the existence of a legal act should control also its formal requirements is correct upon principle.

3. Practical considerations, based upon the requirements of international intercourse, suggest a modification of this rule to the end that compliance with the *lex loci* shall be regarded as sufficient. The reasons advanced for the non-application of the *lex loci* to acts affecting immovables are insufficient. For the sake of security in dealings relating to commercial paper, compliance with the requirements of form of the place of issue should be obligatory, subject to the qualification suggested by the English Bills of Exchange Act.

4. Inasmuch as the law should be liberal in matters relating to mere form, contracts which do not comply with either of the above rules should be regarded as valid if they satisfy the *lex fori* and wills disposing of personal property if they satisfy

213. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, *Col. L. Rev.*, X, 190-207, 327-344.

Art. 3 of the Convention of the Hague, July 17, 1905, relating to wills, provides:

"If the national law of a person prescribes or prohibits a certain form for a will executed outside of his country, a failure to comply with such provision may render the will void in the country of which the testator was a subject; provided, that if the will conforms to the law of the place where it was executed, it shall be valid in the other countries."

the *lex fori* or the law of the domicile of the testator at the time of the execution of the will.

5. All of the preceding rules must be understood as referring to the formal requirements prescribed for the act in question by the territorial law of the state or foreign country referred to, and not to their law as a whole inclusive of the rules governing the Conflict of Laws.

10. VALIDITY AND EFFECTS OF CONTRACTS IN THE CONFLICT OF LAWS*

THERE is no topic in the conflict of laws in regard to which there is greater uncertainty than that of contract. In this country there is no agreement even regarding the fundamental principles that should govern. Elsewhere there is less dispute concerning the general principles, but much difference of view in their application to concrete situations. Under these circumstances a discussion of the question in broad outline may not be amiss. Since an inquiry into the law governing "capacity" to contract and the "formalities" with which a contract must be executed raises a number of special problems, it has been deemed best to omit the discussion of this phase of the subject in the present article, except in so far as it may bear upon the intention theory in general, and to restrict its scope to the intrinsic validity of contracts, and to their effects. The purpose of this article will have been attained if it has pointed out the difficulties in the way of finding a simple solution of the conflicts arising from the diversity of laws relating to contracts (apart from capacity and form), and if it has succeeded in suggesting, in the light of the best juristic thought of the world, some guiding principles by means of which the solution of the particular problems may be found. In this problem, as in most others arising in the conflict of laws, some light may be derived from the juristic discussions of foreign writers and from the experience of foreign nations. So far as it may serve the purpose of this article the foreign law and literature will therefore be considered.

I

Let us examine in the first place the rules which the courts purport to follow in determining the intrinsic validity and effects of contracts from the standpoint of the conflict of laws.

A. Anglo-American Law

(1) *American Law*. A few years ago Professor Beale undertook the laborious task of examining in detail the English and American cases on this subject.¹ It appears from his article

* (1920) 30 YALE LAW JOURNAL 565, 655; 31 *ibid.* 53.

1. (1910) 23 HARV. L. REV. 79.

that our law is in a state of great confusion and that the courts of the same state often follow different theories. By way of general summary Professor Beale concluded that at the time of writing six states, one of which was doubtful, had adopted the law of the place of making; that 16 states, of which five were doubtful, had adopted the law of the place of performance; and that 11 states, besides the District of Columbia, had adopted the law intended by the parties.² The federal courts have generally applied the law of the state or country intended by the parties. Some of them have presumed that the parties intended their contract to be governed by the law of the place of making; others, by that of the place of performance.³

(2) *English Law.* That the law intended by the parties controls the rights and duties arising out of valid contracts is settled law. Dicta in the decisions adopt this principle also as regards the validity of contracts, and Dicey⁴ maintains that the law with reference to which the parties contracted has been fully adopted by the English courts. According to Westlake,⁵ "the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such."

2. *Id.*, 207.

3. *Id.*, 100-103.

4. *Conflict of Laws* (2d ed. 1908) 529, 545, 556. After stating in Exception 1 that a foreign contract will not be enforced in England if it would be contrary to public policy, Dicey adds the following:

"Exception 2.—A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*) (?)" (p. 551).

"Exception 3.—A contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); or (2) the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place. . . .

"SUB-RULE 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

"*First Presumption.*—*Prima facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

"*Second Presumption.*—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)" (p. 563).

5. *Private International Law* (5th ed. 1912) 305.

No case appears to have arisen in England where the nature of the contract and circumstances of the case pointed to a law which would render the contract invalid, and where the intention was expressed to have the contract governed by another law which would support it, but according to Westlake,⁶ it may be confidently expected that the courts will under such circumstances decline to uphold the contract.

B. Continental Law

(1) *French Law.* The intention of the parties is said to govern the intrinsic validity and effects of contracts,⁷ subject to the rules of public order.⁸ In the absence of an express stipulation or special circumstances showing a contrary intention, the parties will be deemed to have contracted with reference to the law of the place where the contract was entered into.⁹ Where the parties have the same nationality, the presumption will be

6. *Ibid.*

7. Cass. (Feb. 23, 1864), (1864) Sirey, Pt. 1, 385; (March 9, 1891), (1891) Dalloz, Pt. 1, 459; (Feb. 6, 1900), (1900) Sirey, Pt. 1, 161, and note; (Dec. 5, 1910), (1911) 7 REVUE DE DROIT INTERNATIONAL PRIVÉ, 395.

Matters relating to reality of consent are often regarded as belonging to "capacity" and as being subject therefore to the personal law. Aubry (1896) 23 CLUNET, 472-474; Audinet, *Principes élémentaires du droit international privé* (2d ed. 1906), 295; Durand, *Essai de droit international privé* (1884) 419; Despagnet, *Précis de droit international privé* (5th ed. 1909), 903-904; 8 Laurent, *Le droit civil international* (1881) 228-229; Pillet, *Principes de droit international privé* (1903) 450 note 1, 456. Valéry holds that all rules relating to reality of consent are rules of public order, so that a contract will not be enforced if it is *contrary to the provisions of the lex fori* in this respect. *Manuel de droit international privé* (1914) 958.

8. The term "public order" is used in many different senses. Valéry, for example, operates with four varieties. With respect to the defence of illegality he holds that if the contract is valid according to the French local rules, the foreign contract will be enforced. If it is illegal according to the local French law, no effect will be given to it in the following cases: (1) If at least one of the parties is French and the performance of the contract would violate a French law of "personal" public order; (2) if the contract is to be performed in France and such performance violates the French "territorial" public order; (3) if the case falls within the French "personal and territorial" public order, for example, if one of the parties is French, or if the contract is made between foreigners in France; (4) if the contract violates French rules of "absolute" public order. Valéry, *op. cit.*, 962-965.

9. See cases in note 7. See also Bard, *Précis de droit international pénal et privé* (1883) 266; Despagnet, *op. cit.*, 882; Durand, *op. cit.*, 420; 2 Laurent, *op. cit.*, 414-416; Surville et Arthuys, *Cours élémentaire de droit international privé* (6th ed. 1915) 300; Weiss, *Traité de droit international privé* (2d ed. 1912) 364.

that they contracted with reference to their national law.¹⁰

(2) *German Law*. The intention of the parties is controlling, subject to the rules of public policy. Where the intention of the parties is not expressed, and does not appear from the circumstances, the *lex loci* was formerly applied.¹¹ Through Savigny's influence the courts have abandoned this view in favor of the law of the place of performance. Gebhard's draft of the German Civil Code relating to private international law pronounced itself in favor of the "debtor's" domicile, the doctrine first championed by Bar. The first commission did not accept Gebhard's recommendation, and preferred, in the absence of circumstances pointing to a contrary intention, the application of the *lex loci*. This rule was retained by the second commission, but the Federal Council struck out all provisions relating to the intrinsic validity and effects of contracts and left the question for determination by the courts. Although the reason for the action of the Federal Council is not clear, it was probably in part due to the fact that it did not regard the science of the conflict of laws, so far as it relates to the above matter, as sufficiently advanced to warrant the adoption of a final rule.¹² Since the adoption of the civil code, the courts have continued to follow the law of the place of performance,¹³ except where the nature of the contract or the circumstances of the case convinced the court that the parties contracted with reference to some other law.¹⁴ Some decisions have been in favor of the law of the debtor's domicile.¹⁵ In the case of bilateral agreements, where the place of performance of one party is different from the place of performance of the other, the duties of each party are determined with reference to the *lex solutionis* of his own part of the contract,¹⁶ unless, in accordance with the presumed intention of the parties, a single law can be deemed applicable to the rights and duties of both con-

10. App. Paris (March 19, 1907), (1907) NOUVELLE REVUE PRATIQUE DE DROIT INTERNATIONAL PRIVÉ, 302; Audinet, *op. cit.*, 283; Surville et Arthuys, *op. cit.*, 299; 4 Weiss, *op. cit.*, 355.

11. 1 Gierke, *Deutsches Privatrecht* (1895) 232, note 67.

12. Krohn, *Die Vertragsobligationen in materieller Beziehung nach deutschem internationalen Privatrecht* (1909) 16.

13. Imperial Court (April 23, 1903) 54 RG 316; (July 4, 1904) 15 ZEITSCHRIFT FÜR INTERNATIONALES PRIVATRECHT, 285; (Dec. 5, 1911) 23 *id.* 346; (Oct. 11, 1910) 24 *id.* 320; (Oct. 2, 1911) 23 *id.* 340; (April 19, 1910) 73 RG 379; (March 11, 1919) 95 RG 164.

14. Imperial Court (Sept. 21, 1899) 44 RG 300.

15. Imperial Court (Oct. 12, 1905) 61 RG 343; (Feb. 12, 1906) 62 RG 379.

16. Imperial Court (Oct. 13, 1894) 34 RG 191; (April 28, 1900) 46 RG 193 (April 21, 1902) 51 RG 218; (June 16, 1903) 55 RG 105.

tracting parties.¹⁷ Such a single law has been held to apply also where the existence of the contract itself is in question.¹⁸

(3) *Italian Law.* Under the influence of Mancini, Article 9 of the Preliminary Dispositions of the Civil Code was adopted, the third paragraph of which provides as follows:

"The substance and effect of obligations are deemed to be regulated by the law of the place in which the acts were done, and, if the contracting parties are foreigners and belong to the same nationality, by their national law. The showing of a different intent is reserved in each case."

(4) *Law of other countries.* The rest of the continental countries appear likewise to have adopted the intention of the parties as the test of the law determining the essential validity and effects of contracts, subject to their respective rules of public policy. Where the intention is not expressed, Belgium,¹⁹ Holland,²⁰ Portugal,²¹ Russia,²² and Spain²³ presume that the parties contracted with reference to the law of the place of contracting. Greece²⁴ and Hungary²⁵ prefer in such a case the law of the place of contracting, and Sweden,²⁶ that of the domicile of the debtor. In Norway the law of the place of contracting governed formerly,²⁷ but there appears to be a strong tendency in favor of the law of the debtor's domicile.²⁸ The Swiss courts appear to apply, unless an intention to the contrary is shown,

17. Imperial Court (April 4, 1908) 68 RG 203; (Apr. 19, 1910) 73 RG 379; (Feb. 4, 1913) 81 RG 273.

18. Imperial Court (Feb. 13, 1891) 47 Seuffert's ARCHIV, 3.

19. Trib. Civ. de Charleroi (June 3, 1901) 30 CLUNET, 898; Trib. de Commerce de Bruxelles (Jan. 2, 1902), (1903) 30 CLUNET, 409; App. Brussels (June 29, 1907), (1908) 35 CLUNET, 562.

20. Court of Appeals of Arnheim (Jan. 19, 1898), (1900) 27 CLUNET, 840; Court of Appeals of Bois-de-Duc (Jan. 22, 1901), (1904) 31 CLUNET, 457.

21. Commercial Code, sec. 4.

22. 1 Klubanski, *Handbuch des gesamten russischen Zivilrechts* (1911) 445; (1904) 14 ZEITSCHRIFT FÜR DAS INTERNATIONALE PRIVATRECHT, 35-36.

According to the law of the Baltic Provinces, if the intention of the parties is not expressed, the law of the place of performance governs. (1877) 4 CLUNET, 208.

23. Torres Campos, *Elementos de derecho internacional privado* (4th ed. 1913) 274 and cases cited.

24. Art. 6 of Law of Oct. 29 (Nov. 10) 1856; Areopage, Section B (1899 no. 25), (1903) 30 CLUNET, 210.

25. Royal Court (1914) 41 CLUNET, 1009.

26. Synnestvedt, *Le droit international privé de la Scandinavie* (1904) 259.

27. *Id.*, 261.

28. *Ibid.*

the law of the place of contracting if the contract is made in Switzerland.²⁹ Swiss law has been applied also where a contract made abroad was to be performed in Switzerland³⁰ or where Swiss subjects entered into a contract while on a visit abroad.³¹ Austria presumes with respect to contracts made between foreigners in Austria that they contracted with reference to the local law.³² The same presumption exists where a foreigner enters into a contract with another foreigner or with an Austrian abroad.³³ Where a foreigner enters into a contract in Austria whereby he confers only benefits upon the other contracting party, Austrian law or his national law will control, according as the one law or the other favors most the validity of the transaction.³⁴ This rule holds true whether the other contracting party is an Austrian or a foreigner. The application of Austrian law is mandatory, so as to exclude the intention of the parties in the case of contracts entered into in Austria between Austrians, or between an Austrian and a foreigner, except where a foreigner bestows an exclusive benefit upon an Austrian without imposing any duty.³⁵

C. Latin-American Law

(1) *Convention of Montevideo*. So far as the provisions of the Convention of Montevideo, of 1889, are applicable, the South American states are bound by the following general rules, as regards civil transactions:

"Article 33. The same law [law of the place of performance] governs as regards their (a) creation; (b) nature; (c) validity; (d) effects; (e) consequences; (f) performance; in fact, all matters concerning contracts whatever their nature.

"Article 34. Contracts regarding specific things are governed therefore by the law of the place where they are at the time of the making of the contract. Those relating to unascertained goods sold by description, by the law of the debtor's domicil at the time of the execution of the contract; those relating to fungible things, by the law of the debtor's domicil at the time of the making of the contract. Those relating to the rendering of services (a) with respect to things, by the law of the place where such things are at the time the contract was made; (b) if their efficacy is connected with some

29. Federal Tribunal (Jan. 22, 1904), (1905) 32 CLUNET, 453.

30. Federal Tribunal (June 21, 1907), (1908) 35 CLUNET, 932.

31. Civil Court of Geneva (March 17, 1904), (1907) 34 CLUNET, 208.

32. Civil Code, sec. 36.

33. *Id.*, sec. 37.

34. *Id.*, sec. 35.

35. Stubenrauch, *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche* (6th ed. 1892) 98.

special place, by the law of the place where the effect is to be produced; (c) in other cases, by the law of the debtor's domicile at the time of the making of the contract.

"Article 35. A contract to exchange things situated in different places which are subject to different laws is governed, if the parties have a common domicile, by the law of their domicile at the time the exchange was made, and in the absence of a common domicile, by the law of the place where the exchange was made.

"Article 36. Accessory contracts are governed by the law applicable to the principal obligation.

"Article 37. The perfection of contracts made by correspondence or agents is determined by the law of the place from which the offer was sent."

Special rules are laid down also in the Convention on Commercial Law with respect to bills of exchange and other special contracts. Respecting bills of exchange, it is provided that the legal relations resulting from the drawing are to be governed, as between the drawer and the payee, by the law of the place of issue, and as between the drawer and the drawee, by the law of the drawee's domicile. The obligation of the acceptor in respect to the holder and the defences available to him are determined by the law of the state where the acceptance took place.³⁶

(2) *Argentine Law.* The law of the place of performance controls the nature, obligation, and validity of contracts in general.³⁷ The essential requisites of bills and notes are determined by the law of the place where the instrument was executed.³⁸

(3) *Brazilian law.* The new Brazilian Civil Code contains the following general provisions:³⁹

Intr. Art. 13. "With respect to the substance and effect of obligations, the law of the place where they were entered into shall govern, unless otherwise stipulated."⁴⁰

"Single Paragraph. However, the Brazilian law shall always govern:

"I. Contracts entered into in foreign countries which are to be performed in Brazil;

36. Secs. 27-28.

37. Civil Code, Arts. 1239, 1244, 1243, 1248; Molina, *El derecho internacional privado y el código civil Argentino* (1882) 183; 3 Alcorta, *Curso de derecho internacional privado* (1892) 233.

38. Commercial Code, Art. 738.

39. Bills of exchange are governed by the law of the place of execution. Art. 47, Bills of Exchange Law.

40. Trib. Sup. de Rio Grande do Sul (March 15, 1910), (1911) 38 CLUNET, 1313; Octavio, *The Conflict of Laws of Brazil* (1919) 28 YALE LAW JOURNAL, 467.

"II. Obligations contracted in a foreign country between Brazilians."

(4) *Chilean Law.* The Civil Code provides that the effect of contracts to be performed in Chile is to be controlled by Chilean law.⁴¹ According to the Chilean writers the law of the place where the contract is made governs otherwise.⁴² The Supreme Court of Chile has stated in a recent decision that a contract is deemed to produce its effect in Chile if it is necessary to sue the defendant in the Chilean courts, notwithstanding the fact that the agreement called for performance in another state.⁴³

(5) *Mexican law.* The Civil Code of the Federal District and of the District of Lower California provides:

Art. 16. The obligations and rights arising from contracts and wills executed in a foreign country by Mexicans of the Federal District or Lower California are governed by the provisions of this code, if they are to be performed in the Federal District or in Lower California.

Art. 17. If the contracts and wills to which the preceding paragraph refers are executed by a foreigner and are to be performed in the Federal District or in Lower California, the person executing the same shall be free to choose the law that shall determine their substantive validity so far as they relate to movable property. As regards immovable property, the provisions of Art. 13 shall control.⁴⁴

D. Japanese Law

Art. 7 of the Law Concerning the Application of Laws in General provides as follows:

"The law governing the creation and effect of a legal transaction is determined by the will of the parties.

"If the will of the parties is not clear the law of the place where the transaction was entered into shall control."

As regards contracts by correspondence, the Japanese law enacts as follows:⁴⁵

"In the case of a unilateral act, the place from which the notice is despatched is regarded as the place of the act; while in the case of a

41. Art. 16, Civil Code.

42. Fabrès, *Le droit international privé dans la législation de Chile* (1887) 14 CLUNET, 140; 1 Salas, *Elementos de derecho civil* (1912) 45.

43. (June 8, 1911), (1913) 40 CLUNET, 1331.

44. I. e. the law of the situs.

45. Art. 9, Law Concerning the Application of Laws in General; de Becker, *International Private Law of Japan* (1919) 98.

bilateral act [contract] the place from which the offer was despatched is regarded as the place of the act and the formation and effect of the act are governed by the law of that place. If, however, the recipient of the offer was ignorant, at the time of his acceptance, of the place from which the offer had been despatched, the place of the offeror's domicile is regarded as the place of the act."

The above summary of the law of the different countries shows that they are practically agreed upon the adoption of the intention of the parties as the fundamental rule governing the validity and effects of contracts (apart from capacity and formalities) in the conflict of laws. There is a vast difference of view, however, in the interpretation of this principle with respect to the various classes of contracts and the multitude of questions arising from contracts in general. Much obscurity exists also regarding the application of the principle itself to matters affecting the validity of contracts as distinguished from their effects. To the extent that the English courts and the decisions of the Supreme Court of the United States and of the state courts have adopted this rule, it is apparent, therefore, that they have not committed themselves to a doctrine which has no support elsewhere, but that they accepted, on the contrary, a view commanding practically universal assent. We shall have to inquire, therefore, (1) into the meaning of the doctrine that the intention of the parties governs; (2) into the consistency of this doctrine with the fundamental conceptions of Anglo-American law; (3) into the application of this doctrine to the validity and effects of contracts.

Origin and Development of Doctrine on the Continent That the Intention of the Parties Is the Governing Law

The origin of the doctrine that the intention of the parties governs the validity and effects of contracts, known as the "autonomy doctrine," is to be found in the writings of Dumoulin. Before his time the views expressed by Bartolus had been generally followed. A distinction was made between the natural consequences of a contract, i. e., those inhering in the contract itself, which Bartolus made subject to the law of the place where the contract was made; and the consequences arising subsequent to its formation as the result of negligence or delay, which he determined according to the law of the place which had been agreed upon for performance. If no place of performance was specified, Bartolus would apply the law of the forum as the law of the place where the negligence or delay

was deemed to have occurred.⁴⁶ In support of the above distinction Bartolus relied upon certain passages in the *Corpus Juris Civilis*. Paul de Castro,⁴⁷ a follower of Baldus, based the application of the *lex loci* upon the fiction that it is the place where the contract was born, contracts like persons, being subject, according to this writer, to the law of the place of their origin, and Rochus Curtius⁴⁸ justified it on the ground that the parties had tacitly submitted to the law of the place of contracting. Whatever the theory of the old statutists may have been in this matter, it is clear that in their opinion the *lex loci* governed the intrinsic validity and direct effects of contracts as a matter of law, regardless of the intention of the parties.

Dumoulin proclaimed with respect to contracts the principle that the will of the parties is sovereign, and that, if the will is not expressed, it must be sought in the surrounding circumstances, the place of contract being one, but only one, of these circumstances.⁴⁹ The application of the law of another state in the matter of contracts is, in the eyes of Dumoulin, not so much the application of a law, as the enforcement of a tacit agreement assumed and sanctioned by such law, to which he attributes the same force as is possessed by an express agreement. This new doctrine was attacked by d'Argentré, the champion of the theory of the territoriality of laws, whose influence prevailed in France until the time of Bouhler and Pothier. The *lex loci* was considered therefore as having obligatory force, but the rule was subject to many exceptions. Of the later French statutists Boullenois defended most wholeheartedly Dumoulin's doctrine, which became the prevailing view in Pothier's time. Early in the nineteenth century a strong opposition manifested itself again in France to the theory that the application of the *lex loci* results from the will of the parties, but the autonomy doctrine became firmly established through a decision of the Court of Cassation in 1836. Since then it has been applied not only to the determination of the rights and duties arising out of contracts admitted to be valid, but also with respect to the intrinsic validity of contracts in general. In connection with this new development Savigny's influence appears to have been especially felt.⁵⁰ The views of this writer that the law of the place of performance should control, in the absence of an expressed declaration to the contrary, were not accepted, however, the law of the place of

46. Bartolus, *Conflict of Laws* (Beale's transl. 1914) 18-20.

47. 1 Lainé, *Introduction au droit international privé* (1888) 189.

48. *Id.*, 205.

49. *Id.*, 229.

50. 1 Donnedieu de Vabres, *L'évolution de la jurisprudence française en matière des conflits des lois* (1888) 180-181.

contracting and the common national law being preferred instead.

Dumoulin's view that the will of the parties, expressed or implied, is the leading factor in the determination of the law governing contracts was accepted also by the Dutch writers. Huber says:⁵¹

"The place, however, where a contract is entered into, is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control. 'Everyone is deemed to have contracted in the place in which he is bound to perform,' (Digest 44, 7, 21)."

The great Dutch writer John Voet⁵² expressly recognized the will of the parties to be sovereign in the field of contracts, except as regards capacity, formalities, and matters of public policy, but as he did not emphasize this part of his doctrine, it was lost sight of in his huge commentary on the Pandects and exercised comparatively little influence upon the law of foreign countries.

The general acceptance on the continent today of the doctrine that the intention of the parties is the controlling consideration in the conflict of laws, so far as it concerns contracts, is due in large measure to the influence of Savigny. In accordance with his underlying theory of the Conflict of Laws, he seeks to discover for every legal relation that territory to which, in its proper nature, it belongs or is subject (in which it has its *seat*). Savigny contends that the forum of the obligation coincides with its true seat, both depending upon the voluntary submission of the parties to the local law. Such submission is generally by a tacit declaration of will and is always excluded by an express declaration to the contrary. "We have therefore to inquire," he says,⁵³

"to what place the expectation of the parties was directed—what place they had in their minds as the seat of the obligation. At this place we must fix the forum of the obligation, in virtue of their voluntary submission. But as the obligation itself, as a legal relation, is incorporeal and has no locality, we must seek, in its natural process of development, for some visible phenomena to which we may attach the essence of the obligation, in order to give it, as it were, a body."

The expectation of the parties being in the estimation of Savigny directed to fulfilment, he concludes that they must

51. Praelect. pt. 2, bk. 1, tit. 3, n. 10.

52. *Ad Pandectas*, pt. 2, bk. 1, tit. 4, n. 18.

53. *Private International Law* (Guthrie's transl. 1880) 198.

have intended to submit to the law of that jurisdiction.⁵⁴ The place of performance is, in the first place, the place which is specially fixed as the place of performance. Such place may result from an express agreement or from the fact that the performance can be effected only in a particular place. If no place of performance has been fixed in the manner specified, the place of performance is (a) the debtor's place of business, if the duty in question arose out of a transaction connected with such business; (b) the place where the contract was entered into, if the circumstances created an expectation that its performance was to be at the same place; (c) the debtor's domicile, if the duty was assumed in that state, or if none of the other conditions above mentioned exist.⁵⁵

"All these cases," says Savigny,⁵⁶

"however various they appear, and however accidental their connection may seem, yet admit of being reduced to a common principle. It is always the place of fulfilment that determines the jurisdiction, either that expressly fixed, or that which depends on a tacit expectation. In both cases a voluntary submission to this jurisdiction is to be assumed, unless an express declaration to the contrary excludes it. . . .

"The derivation of the rules here laid down from the presumed voluntary submission of the debtor to a particular territorial law, has some weighty practical results which must here be reviewed.

"A. This territorial law ceases to be applicable when it is at variance with an absolute, strictly positive rule of law in force at the place of the court which decides the question (sec. 349); for in such cases the free-will of the parties can have no influence at all.

"B. The territorial law likewise ceases to apply when the presumption of voluntary submission is excluded by an expressed contrary intention."⁵⁷

An extreme expression of the intention theory is advocated by the great Belgian jurist Laurent, who says:⁵⁸

"Whenever parties contract they are legislators; their will takes the place of law. It follows from this that in the matter of contracts the question is governed by entirely different principles from those applied to other juristic acts. In reality it is no longer a question of statute, but solely of the will of the parties. . . . Thus it is that in the matter of status the will of the parties counts for nothing; it is the law that controls, either the personal or the territorial law. In the matter of contracts, on the other hand, the will of the parties is everything. They themselves made the law; it is therefore their will which determines by what law they are to be governed.

54. *Id.*, 209-210.

55. *Id.*, 209-210, 222.

56. *Id.*, 210.

57. *Id.*, 223.

58. 2 Laurent, *op. cit.* note 7, at pp. 383-384.

"The German jurists have given to this doctrine that the will of the contracting parties determines the law that shall govern their agreement a significant name—they call it autonomy, to indicate that the individuals are in this matter autonomous, that is to say sovereign, as were formerly the autonomous cities. The expression is exact, provided one limits the autonomy of the individuals to private rights and interests. It is certain that the contracting parties cannot determine their status and capacity; these matters belong to public order, and as such fall within the exclusive province of the legislator. Still less can they regulate what belongs to the sovereign power. To express myself in the language ordinarily used, everything belonging to status and to the real statute is beyond the autonomy of the individuals."

Against these exorbitant claims in support of the autonomy doctrine, put forward by Laurent, a reaction has set in on the Continent, where it is conceded to-day that the will of the parties does not stand above the law, but that it can operate only within the limits prescribed by law.⁵⁹

Origin and Development of Intention Theory in England and the United States

The doctrine that the intention of the parties governs in the matter of contracts from the standpoint of the conflict of laws was introduced into Anglo-American law by a dictum of Lord Mansfield in the case of *Robinson v. Bland*.⁶⁰ This was an action of *assumpsit* in three counts. The first count was on a bill of exchange drawn at Paris by the intestate on himself in England for £672, and accepted by the intestate. The second was for £700 lent in France to the intestate. The third count was for £700 had and received in France by the intestate to the use of the plaintiff. It was found that the bill of exchange was given at Paris for £300 there lent by the plaintiff to the intestate, and lost by the latter to the plaintiff at play, and for £372 more, which the intestate had lost in the same way. It was found that the money lost at play between gentlemen could be recovered in France as a debt of honor before the marshals of France, though such money was not recoverable in the ordinary courts, and that money lent to play with could be recovered in France as a debt in the ordinary courts, and that both plaintiff and intestate were gentlemen. The Court of King's Bench decided that the bill of exchange was void and that the money lost at play could not be recovered, but that the money lent could be recovered. Two of the three judges, including Lord Mansfield,

59. Pillet, *op. cit.* note 7, at pp. 443 ff.

60. (1760, K. B.) 2 Burr. 1077.

found that the law of France and the law of England were identical with respect to the above points. Lord Mansfield stated, however, that he would have reached the same conclusion had the law of France and of England been proved to be different. In support of the application of English law he gave two reasons:

"First, the parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. *Huberi Praelectiones*, lib. 1, tit. 3 pa. 34, is clear and distinct: '*Veruntamen, etc. locus in quo contractus, etc. potius considerand', etc. se obligavit.*' Voet speaks to the same effect.

"Second reason—. . . In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here."⁶¹

Lord Mansfield's dictum has been adopted and developed by subsequent English cases.

In the case of *In Re Missouri S. S. Co.* Lord Justice Fry summed up the present doctrine of the English courts as follows:⁶²

"I think, therefore, the general principle on which we have to proceed is one which admits of no doubt; and the inquiry, therefore, is this: Looking at the subject-matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this contract? By that I mean to determine its validity and its interpretation."

Dicey⁶³ concludes from the English decisions that the intention of the parties governs the effects of contracts. As regards intrinsic validity Dicey contends, however, that the parties can subject their contract to the operation of foreign law only *indirectly*, their intention being of great weight in determining, where the facts connect a contract with several states, whether the contract is a contract of the one state or of the other. Westlake⁶⁴ feels that the English courts have come to determine the intrinsic validity of contracts on substantial considerations without reference to the intention of the parties, namely, by the law of the state with which the contract has the most real connection.

61. *Id.*, 210.

62. (1889) L. R. 42 Ch. Div. 321, 340-341.

63. *Op. cit.*, 545-547, 814 ff.

64. *Op. cit.*, 305.

Before the above decisions were rendered Lord Mansfield's view had been adopted in the United States.⁶⁵

Story, who purports to follow Lord Mansfield's dictum, expresses himself as follows:

"The ground of this doctrine, as commonly stated, is that every person contracting in a country is understood to submit himself to the law of the place, and silently to assent to its action upon his contract. . . . It would perhaps be more correct to say that the law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons and property and transactions within its own territory."⁶⁶

"Another rule illustrative of the same general principle is, that the law of the place of the contract is to govern as to the nature, the obligation, and the interpretation of the contract, *locus contractus regit actum*.⁶⁷

"The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice."⁶⁸

Story does not define what he means by the "presumed intention" of the parties, and the same vagueness is found in practically all subsequent cases. Most of them apply the law of the place of performance when it differs from that of the place of contracting, without reference to the other surrounding circumstances. In certain cases, especially in cases involving the defence of usury, the presumption that the parties contracted with respect to the law of the place of performance is deemed to be rebutted if the contract is void under that law but valid under the law of the place of contracting. There are only a few cases which seek to find the law with respect to which they feel that the parties would have contracted, had their attention been called to the matter, from an actual examination of the at-

65. *Ludlow v. Van Rensselaer* (1806, N. Y. Sup. Ct.) 1 Johns. 94; *Powers v. Lynch* (1807) 3 Mass. 77; *Thompson v. Ketcham* (1811 N. Y. Sup. Ct.) 8 Johns. 146; *Fanning v. Consequa* (1820 N. Y. Sup. Ct.) 17 Johns. 511; *Prentiss v. Savage* (1816) 13 Mass. 20; *Van Reimsdyk v. Kane* (1812, U. S. C. C. D. R. I.) 1 Gall. 371; *Cox v. United States* (1832, U. S.) 6 Pet. 172.

66. *Conflict of Laws* (8th ed. 1883) 348-349.

67. *Id.*, 351.

68. *Id.*, 376.

tendant circumstances. One of these is *Grand v. Livingston*.⁶⁹ The question before the court in that case involved the validity of a stipulation against negligence in a bill of lading which had been issued in Massachusetts for the transportation of horses to New York. "The determination of this question," said the learned court, "involves not only a careful examination of the 'instrument itself, but likewise of all the circumstances attending its execution.'" Regarding the question of intention it made the following observations:

"As was suggested upon the argument, the question of intent can hardly be said to involve the actual mental operations of the parties. For, as a matter of fact, they probably did not stop to consider what was the legal effect of their agreement, or whether there was any diversity in the law of the two states; and, therefore, when we speak of the 'question of intent,' we are making use of what may perhaps be termed a 'legal fiction'; but, nevertheless, the law does look at the acts of the parties, and the circumstances surrounding them, which may possibly have exerted some influence upon their actions, and then assumes that their intention is in harmony with such acts and circumstances."

The position of the Supreme Court of the United States with reference to the law governing the intrinsic validity and effects of contracts is not well defined.⁷⁰ Some of its decisions purport to apply the intention theory, as, for example, the case of *Pritchard v. Norton*.⁷¹ A bond had been executed by the defendants in the state of New York, in which they undertook to indemnify the plaintiff against all loss arising from his liability as surety on an appeal bond executed by him on behalf of the appellant in a certain suit then pending in the Louisiana courts. In a suit upon the bond the defence was that the contract was void under the law of New York, the place of contracting, for want of consideration. The Supreme Court, speaking through Mr. Justice Matthews, said:⁷²

"The phrase *lex loci contractus* is used, in a double sense, to mean, sometimes, the law of the place where a contract is entered into; sometimes, that of the place of its performance. And when it is employed to describe the law of the seat of the obligation, it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or pre-

69. (1896) 4 App. Div. 589, 38 N. Y. Supp. 490.

70. See (1910) 23 HARV. L. REV. 100-103.

71. (1882) 106 U. S. 124, 1 Sup. Ct. 102.

72. 106 U. S. 136-137.

sumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 48, where he defined it as a principle of universal law—"the principle 'that in every forum a contract is governed by the law with a view to 'which it was made.'"

No effect will be given to the intention of the parties if it is against public policy or if the provisions of a statute of the place of making would be avoided thereby.⁷³

As regards the intrinsic validity of contracts continental courts and writers usually content themselves with saying that the intention of the parties governs, subject to the rules of public policy. But when it comes to the solution of particular cases the greatest divergence of opinion manifests itself. There is no agreement whatever concerning the fundamental basis upon which the rules of the conflict of laws are conceived to rest, nor in regard to the meaning of the term "public policy." This appeared clearly at the meeting of the Institute of International Law of Paris, in 1910, when this subject was under discussion.⁷⁴ The best that could be accomplished at the meeting was the adoption of the following motion, made by Renault:⁷⁵

"In order to avoid the uncertainty arising from the arbitrary action of judges compromising the interests of the parties, the Institute expresses the wish that each country determine as definitely as possible those provisions of law which it will never surrender in favor of another system, even though the latter should be regarded on principle as the competent law to regulate the legal relationship in question."

"It is especially desirable that each convention relating to private international law should enumerate the points in regard to which the application of the principles adopted by the convention may be set aside in each contracting state by considerations of public policy."

Since the days of the statistists such operative facts as constitute "capacity" or "formalities" have been set apart on the Continent from the other operative facts relating to the validity of legal transactions and have been placed under special rules, the former being subject to the personal law (*lex patriae*, *lex*

73. See *Equitable Life Ins. Co. v. Clements* (1891) 140 U. S. 226, 11 Sup. Ct. 822.

74. (1910) 23 ANNUAIRE DE L' INSTITUT DE DROIT INTERNATIONAL, 458-481.

75. *Id.*, 478.

domicilii)⁷⁶ and the latter to the *lex loci* (*locus regit actum*).⁷⁷ The autonomy doctrine has not been extended to these questions. In England and in this country the above matters have not been clearly distinguished from the other elements affecting the validity of contracts. "Capacity" to contract is governed in this country by the law of the state in which the contract is made, without reference to the law of the place of payment, or to the law with reference to which the parties may have otherwise contracted.⁷⁸ In England the law is uncertain on the point.⁷⁹ The *lex loci* applies also, regardless of the law of the place of performance or the "intention" of the parties, in the matter of formalities, so far as the question is not connected with the statute of frauds, and as such subject to the law of the forum.⁸⁰ These rules are applied even in jurisdictions which adopt the law of the place of performance or the so-called intention theory in the determination of the validity of contracts in other respects. There are a few American cases, however, which have accepted the intention theory even as regards "capacity"⁸¹ and "formalities."⁸²

It will be necessary now to inquire more closely into the meaning of the intention theory, in order to ascertain whether it can be profitably invoked in the solution of the problems arising in the Conflict of Laws with respect to contracts.

II

LAW GOVERNING THE INTRINSIC VALIDITY OF CONTRACTS

Notwithstanding the above array of authorities, both continental and Anglo-American, in support of the intention theory,

76. Lorenzen, *The Conflict of Laws Relating to Bills and Notes* (1919) 65-67.

77. Lorenzen, *Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws* (1911) 20 YALE LAW JOURNAL, 427, 431 ff.

78. Minor, *Conflict of Laws* (1901) 145-146, 416.

79. Dicey, *op. cit.*, 538.

80. Minor, *op. cit.*, 83.

81. *Poole v. Perkins* (1919) 126 Va. 331, 101 S. E. 240; *Mayer v. Roche* (1909) 77 N. J. L. 681, 75 Atl. 235.

The opinion in *Poole v. Perkins* is based upon a perfectly logical application of the intention theory. If the intention of the parties can govern the intrinsic validity of contracts, there is no *logical* reason why it should not determine also the "capacity" of the parties to enter into the contract. The reasoning proceeds, however, from the erroneous premise that the application of the *lex loci* in determining the capacity of the parties when they are present in the state of contracting, results from their intention to contract with reference to such law. See Story, *op. cit.*, 348-349.

82. *Hall v. Cordell* (1891) 142 U. S. 116, 12 Sup. Ct. 154.

it is open to serious criticism, so far as it is applied to the intrinsic validity of contracts.

"Wide as the operation necessarily is which is given to the *intention* of the parties to a contract," says Foote,⁸³ "it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all courts alike."

Foote concludes, therefore, that the legality of a contract depends generally upon the law of the place of intended performance, but that the legality of the making of the agreement, i. e., giving a particular consideration for a particular promise, is controlled by the *lex loci actus*.⁸⁴

Professor Minor also rejects the intention theory in its application to the validity of contracts. He would determine everything relating to the *validity* of the contract by the law of the place where it is made; everything relating to the *performance* of the contract, by the law of the place of performance; and the legality or sufficiency of the *consideration*, by the law of the situs of the consideration.⁸⁵

The most vigorous opponent of the intention theory is Professor Beale.⁸⁶

"The fundamental objection to this," he says, "in point of theory, is that it involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract. The adoption of a rule to determine which of several systems of law shall govern a given transaction is in itself an act of the law."

Professor Dicey admits the force of the criticism just stated, but, seeks, nevertheless, to justify the intention theory. In Rule 151 he summarizes what he conceives to be the English law on the subject as follows: "The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract." By the proper law of the contract Dicey means "the law or laws by which the

83. Foote, *Private International Jurisprudence* (4th ed., 1914) 358-359.

84. Foote, *op. cit.*, 359-363.

85. Minor, *Conflict of Laws* (1901) 401-402.

86. (1910) 23 HARV. L. REV. 260.

"parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves."

"This theory," says Dicey,⁸⁷ "is consistent not only with the language of English judges, but, what is of more consequence, with their mode of thought. They hold that a contract is governed by the law of the country with which it has the most substantial connection, or, to put the matter shortly, to which it belongs, i. e., that an English contract is governed by English law, an American contract by American law, and so forth. But when we ask what is the circumstance which in the main determines what is the country to which a contract belongs, we find that it is the intention of the parties, or, in other words, we are brought round again to the conclusion that the essential validity of a contract is in the main determined by the proper law thereof. We can now see what is the real meaning of English judges when they decline, as they often most rightly do, to be bound by any hard and fast rule as to the law governing the construction or validity of a contract. They do not intend to question the principle that a contract is governed by the law or laws to which the parties intended to submit themselves, but do intend to express the perfectly sound doctrine that in ascertaining what this intended law is, a Court ought to take into account every circumstance of the case, and ought not to be tied down to any rigid presumption that the parties must have intended to be bound by a particular law, whether it be the *lex loci celebrationis*, or the *lex loci solutionis*. . . .

"The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its essential validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, and this state of things cannot be altered by the fact that Englishmen contracting in England intend, and even in so many words express their intention, that a promise made by one of them, X, to the other A, shall, though made without a consideration, be governed by the law of a foreign country, and therefore be valid. . . .

"The reply to this objection is that its force depends on a misunderstanding of the principle contended for. No one can maintain that persons who really contract under one law can by any device whatever render valid an agreement which that law treats as void or voidable. What is contended for is that the *bona fide* intention of the parties

is the main element in determining what is the law under which they contract. To put the same assertion in another form, an English contract is governed by English law, a French contract is governed by French law; but when, say, an Englishman and a Frenchman, or two Englishmen, enter in England into a contract to be wholly or partly performed in France, their *bona fide* intention is, at any rate, the chief element in determining whether the contract is an English contract or a French contract. No doubt, in deciding this matter, the Court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its essential validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, e. g. the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the Court, their real intention was to enter into an English contract.

"If this one solid objection to our theory be removed, the doctrine that, according, at any rate, to the view of English judges, the essential validity of a contract is determined by its proper law is, it is submitted, made out. It will be noted that in Rule 151, the statement is made that the essential validity of a contract is governed 'indirectly' by its proper law. The word 'indirectly' is inserted for the very purpose of showing that the parties cannot directly determine by their choice whether a contract shall be legal or not. What they can do is to determine what is the law under which they in fact contract, and the rules of this law, i. e., the proper law, will, subject, however, to wide exceptions, determine whether a contract is essentially valid or invalid."

In regard to this explanation Professor Beale makes the following observations:⁸⁸

"It is certainly not theoretically impossible," he says, "to assign a contract to some one state as the seat of the obligation and to have it governed by the law of that state. Some such suggestion has already been made by the author as solving the difficult question of what law governs a trust of chattels created *inter vivos*. This suggestion was made, however, not as to the creation of a trust, but as to its administration after it had been validly created. Before such a principle can come into force it is necessary to have a trust validly created. In the same way some such doctrine might well be accepted to govern the performance of a contract once validly created; but it is still necessary to get the obligation created, and until that is done the parties are hardly in a position to discuss the seat of its performance. The ingenious suggestion does not at all relieve us of the necessity of admitting, if we accept any rule giving effect to the intention of the parties, that we allow the parties by their own will to create an obligation, where, by the law of the place under which they act, no legal obligation would be attached to the agreement."

88. (1910) 23 HARV. L. REV. 263.

So far as it applies to the validity of contracts the intention theory does not admit of a theoretic defence. The validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals. Dicey's explanation of the intention theory does not meet this objection. If the parties to a contract which is made in England and is to be performed in France can, by the mere operation of their will, make it a French contract or an English contract, which is subject, as regards intrinsic validity, to French or English law, respectively, they are in fact determining the validity of the contract, and to that extent exercising sovereign powers. This is true though they may be restricted in their choice to the law of the states with which the contract has a substantial connection.

The writer rejects, however, the implication contained in the above quotation from Professor Beale that the law of the place where a contract is made necessarily determines its intrinsic validity.

The intention theory has been adopted so widely as the fundamental basis for the solution of the conflict of laws with respect to contracts, notwithstanding the theoretic objection mentioned, because it possesses certain practical advantages over the other rules that have been so far proposed. It can be overthrown, therefore, only if some substitute can be discovered which will possess the same practical advantages as the intention theory, without being open at the same time to the theoretic objection referred to. With this object in view let us examine briefly the different rules that have been suggested for the solution of the problem before us.

1. *View that the law of the place of contracting should determine the intrinsic validity of contracts.* In support of the *lex loci* the theory of a voluntary submission has been frequently advanced, but this is a mere fiction in the absence of a declaration of intention to that effect.⁸⁹ Professor Beale contends that the law of the place of contracting has the exclusive power to create a contract, by reason of the territorial sovereignty of each state.

"If the law of the place where the parties act refuses legal validity to their acts it is impossible to see on what principle some other law

89. See 1 Aubry et Rau, *Cours de droit civil français* (5th ed. 1897) 163; Diena, *Principi di diritto internazionale* (1910) 245; 1 Foelix, *Traité de droit international privé* (4th ed. 1866) 223; Niemeyer, *Vorschläge und Materialien* (1895) 242; (1898) 3 DEUTSCHE JURISTENZEITUNG, 372; Pillet, *Principes*, 440; Valéry, *Manuel de droit international privé* (1914) 979-980.

may nevertheless give their acts validity. The law of the place of performance can have no effect as law in another place, namely, the place where the parties act; for it is a fundamental doctrine of our law that 'the laws of every state affect and bind directly . . . all contracts made, and acts done within it. A state may therefore regulate . . . the validity of contracts and other acts done within it; the resulting rights and duties growing out of these contracts and acts.' Any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to that law extraterritorial effect."⁹⁰

"In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, i. e., the law of the place where the parties act in making their agreement. If by the law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it."⁹¹

"The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so. . . .

"This doctrine gives full scope to the territoriality of law, and enables each sovereign to regulate acts of agreement done in his own territory."⁹²

Professor Minor⁹³ appears to share in general Professor Beale's views, although he does not deduce therefrom the same conclusions as the latter regarding the intrinsic validity of contracts. The Supreme Court of the United States also has adopted the same theory with respect to the legislative power of the individual states⁹⁴ and, of late, with respect to torts in general.⁹⁵

90. (1910) 23 HARV. L. REV. 267.

91. *Id.*, 268.

92. *Id.*, 270-271.

93. "The only law that can operate to *create* a contract is the law of the place where the contract is entered into (*lex celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If by the law of the state *no* contract has been made, there is no contract. Hence, if by the *lex celebrationis* the parties are incapable of making a binding contract, there is *no* contract upon which the law of any other state can operate. It is void *ab initio*." *Conflict of Laws* (1901) 410.

94. *Equitable Life Assur. Soc. v. Clements* (1891) 140 U. S. 226, 11 Sup. Ct. 822; *New York Life Ins. Co. v. Head* (1914) 234 U. S. 149, 34

The doctrine of the territoriality of law is fundamental in Anglo-American law, but the consequences deduced therefrom, so far as the conflict of laws is concerned, are often misleading, and not infrequently erroneous. Story himself is not free from criticism in this respect. He says:⁹⁵

"The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory.

"The direct consequence of this rule is, that the laws of every state affect and bind all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it."

What does Story mean when he says that the laws of every state affect all contracts made within it? The statement would seem to imply that all contracts executed in state X are subject to the rules governing contracts in that state, but that cannot be Story's meaning, for in a later section he makes it perfectly plain that if the place of performance is in state Y the laws of state Y will control. The maxim furnishes therefore no rule for the solution of the conflict of laws.

Story's second maxim is equally ambiguous.

"Another maxim or proposition is that no state or nation can by its laws directly affect or bind property out of its territory, or bind persons not resident therein, whether they are natural-born subjects or others. This is a natural consequence of the first proposition."^{96a}

If this maxim is intended to state only that the sovereign state X cannot compel the sovereign state Y to enforce laws enacted by state X or to recognize the private rights thereby created, the statement is obviously true, but of no help in solving the problems of the conflict of laws. Should the meaning of the passage be, on the other hand, that state Y will recognize the

Sup. Ct. 879; *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357, 38 Sup. Ct. 337; cf. *Am. Fire Ins. Co. v. King Lumber Co.* (1919) 250 U. S. 2, 39 Sup. Ct. 431. A stipulation that the law of another state shall govern will be ineffective if inconsistent with the law of the state where the contract was made. *Mut. Life Ins. Co. v. Hill* (1904) 193 U. S. 551, 24 Sup. Ct. 538; *Supreme Lodge v. Meyer* (1905) 198 U. S. 508, 25 Sup. Ct. 754.

95. *Slater v. Mexican Nat. Ry.* (1904) 194 U. S. 120, 24 Sup. Ct. 581; *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542, 34 Sup. Ct. 955; *Spokane Inland Ry. v. Whitley* (1915) 237 U. S. 487, 35 Sup. Ct. 655.

96. *Conflict of Laws* (8th ed. 1883) 21.

96a. *Id.*, 22.

rights created by state X so far as they fall within the legislative limits laid down by the first maxim, but not if the legislation transcended those limits, the generalization is entirely too broad. The recognition or non-recognition of the rights in question would depend upon the rules of the conflict of laws existing in state Y, which might reject in large measure the claims of the *lex loci*. If the above maxim has reference to the effect of such legislation in state X and be intended to convey the thought that state X has no power, so far as its own organs are concerned, to create rights based upon acts occurring in state Y, it is absolutely erroneous. Story himself admits that a contract made in state Y but to be performed in state X would be subject to the law of state X. Professor Beale holds, consistently with his fundamental theory, that the law of the place of contracting governs the validity of contracts, irrespective of the law of the place of performance. "If the law of the place "where the agreement is made," he says,⁹⁷ "annexes no legal "obligation to it, there is no other law which has the power to "do so." It may be properly asked, however, who conferred such exclusive power upon the state where the contract was made? Such power was certainly not conferred by a common superior having power to define and to limit the legislative and judicial power of the various states, for no such superior exists as yet. The power must be derived therefore from agreement; but no such agreement, even in a tacit form, can be shown to exist. No common usage nor rule of international law defining the legislative and judicial power of nations in the matter of the conflict of laws has so far been developed.⁹⁸ The power of each state to create private rights is, so far as its own organs are concerned, necessarily unrestricted.⁹⁹ A sovereign state has in the very nature of things the power to attach any legal consequences whatever to any state of facts whatever, including acts in other countries, even by persons not citizens or residents of the former. The conditions under which it will do so are determined, on grounds of policy, by each sovereign himself. As regards this country these conditions are prescribed by the Supreme Court of the United States so far as the question falls within the provisions of the federal Constitution; in other respects the individual states are free to adopt such rules of the conflict of laws as they may deem best.

The writer has discussed this question in another place where he says in part:

97. (1910) 23 HARV. L. REV. 271.

98. Concerning the relationship between international law and the conflict of laws see (1920) 20 COL. L. REV. 269-270, 278-279.

99. *Id.*, 272-280.

"Notwithstanding these statements by such eminent authorities, it is submitted that while the theory that a particular territorial law is exclusively applicable to a particular set of operative facts may be established in this country as a matter of constitutional law, it cannot be accepted analytically as a sound basis for the conflict of laws. Where all the operative facts occur in a single state it may be conceded that *as a matter of expediency* the rights of the parties should be determined ordinarily in accordance with the law of such state. But if the forum sees fit, it may adopt another rule. Where the operative facts occur in or affect more than one state, there is much greater difficulty in selecting the governing rule. Generally speaking, Anglo-American law will incorporate the law of some particular foreign state. It will select at times the law of the place where the act was done or was to be performed; at other times, the law of the situs of the property and not of the place of acting; at other times still it will choose neither the law of the place of acting nor that of the situs of the property but the law of the domicil. Where a contract is entered into through an agent, it will bind the principal in accordance with the law of the place where the agent acts, although the principal was never in the latter state and he had no capacity under the law of the state in which he was domiciled and in which he appointed the agent. Sometimes a legal transaction will be sustained if it conforms to the law of one of several states.

"That there is *no logical necessity* for the application of any particular rule selected by Anglo-American law is seen from the fact that different rules with respect to the same set of facts often prevail in foreign countries. Nor can our rules of the conflict of laws be explained by any theory of 'territoriality' other than the general doctrine that the law of the forum selects the rules which shall control. In fact, the only answer that can be given to the question why the common law has chosen a particular rule to govern in the conflict of laws or in any other branch of law is that it has seemed to the forum sound policy to do so. . . .¹⁰⁰

"As long as the Anglo-American notion of law is based upon the existence of physical force on the part of organized society, all legal relations, including rights, duties, privileges, no-rights, powers, liabilities, immunities and disabilities must necessarily have reference to some particular territorial law. Each organized society, by virtue of its existence as a sovereign, is obliged to define for itself what rights, duties, privileges, etc. shall attach to the operative facts which may be presented for determination to its judicial or executive agents, without directions or suggestions from the organized society within whose territory those facts may have occurred. Whether the operative facts happened wholly within its territory or partly or wholly without such territory cannot make any difference. 'Rights' being the correlatives of 'duties,' for the non-performance of which organized society will inflict disagreeable consequences upon the person owing the duties, it is impossible, of course, to recognize that a party has a

legal right in a given state if there are no remedies available in such state for its enforcement.”¹⁰¹

Professor Beale seems to think that Lord Mansfield, Story, and practically all the English and American judges who have applied the intention theory or some rule other than the *lex loci* in the determination of the validity of contracts have been misled into accepting the continental theory of law.¹⁰² This assumption is, however, without foundation. The truth of the matter is rather, that the law of the place of contracting appeared to furnish too narrow a basis for the solution of the conflict of laws and was rejected for that reason as an exclusive rule governing the intrinsic validity of contracts.

Let us consider now the advantages and disadvantages of the *lex loci*. From a practical point of view the chief advantage of the *lex loci* over any other rule is its simplicity. Even as regards contracts by correspondence the application of this rule presents less difficulty than that of the debtor's domicile or that of the place of performance. It is urged also that the *lex loci* is the only rule that can successfully cope with the vexed question of bilateral contracts, inasmuch as it necessarily leads to the application of one law in the determination of the rights and duties of the parties. Another argument urged in favor of the law of the place of contracting is the fact that it is the only law which both parties can ascertain with equal facility. With respect to contracts *inter praesentes* this contention is sound. The *lex loci* is in those cases the only law with respect to which both parties can get expert advice,¹⁰³ for a lawyer has technical knowledge only of the law of the state or country in which he is practicing.

The chief objection raised against the law of the place of contracting is that it is “accidental, transitory, foreign to the “substance of the obligation.”¹⁰⁴ This is especially true in contracts concluded by correspondence, which constitute perhaps the majority of the cases arising in the conflict of laws.¹⁰⁵ In

101. *Id.*, 276-277.

102. See (1909) 23 HARV. L. REV. 7.

103. *Id.*, 271-272.

104. Savigny, *Private International Law* (Guthrie's transl. 1880) 198.

105. Many continental writers contend therefore that contracts by correspondence should be governed by the law of the domicile of the offeror, by the law which will postpone the formation of the contract longest, or by some other law. Bartin, (1897) 24 CLUNET, 476; *Études de droit international privé* (1899) 44-45; Chrétien, (1891) 18 CLUNET, 1028; Dreyfus, *L'acte juridique en droit international privé* (1904) 363. In favor of the national law of the offeror Cass. Turin (Jan. 31, 1891), (1891) 18 CLUNET, 1026.

these cases the *lex loci* may be wholly accidental, and the assumption that both parties can get with equal facility expert legal advice is without foundation. The place of contracting is not known in these cases until the negotiations are completed, and even if it could be known beforehand, it would be a foreign law to at least one of the contracting parties. The place of contracting is dependent in these cases upon positive rules of law which vary considerably in the different countries.¹⁰⁶ In this country it is determined by the last act that was necessary to make it a binding contract. If, for example, the negotiations are carried on between parties in Connecticut and in New York, and the final letter happens to be posted in New Jersey, it would be a New Jersey contract, and subject to New Jersey law. The validity of the contract would thus be determined by a law which had no other connection with the contract than the accidental mailing of the letter of acceptance in that state.

2. *View that the law of the place of performance should control.* The view that the law of the place of performance should control the validity and effects of contracts is due in this country, as was shown in a previous article, to the influence of Lord Mansfield's dictum in *Robinson v. Bland*.¹⁰⁷ This dictum was accepted by the early American cases and was reinforced by Story in his celebrated treatise on the conflict of laws. Story states that the application of the law of the place of performance results from "natural justice,"¹⁰⁸ and he relies in support of his conclusion upon passages from the Roman law, upon certain of the old continental writers, upon Lord Mansfield's dictum, and upon the American cases that adopted this dictum. So far as the authorities cited by Story bear out his contention,¹⁰⁹ they will be found to be based principally upon a passage in the *Corpus Juris Civilis*: "*Contraxisse unusquisque in eo loco intellegitur, in quo ut solveret, se obligavit.*"¹¹⁰ Story cites this passage. The foreign writers referred to by Story base their conclusion largely upon this passage, as did also Huber, whose views were adopted by Lord Mansfield. The great Romanist, Wächter, has shown, however, that the provision of the Roman law relied upon cannot be accepted in a literal way,

106. In Belgium, Italy, Roumania, Russia and other countries the contract is not deemed completed until the letter of acceptance reaches the offeror. (1920) 20 COL. L. REV. 252, notes 31-35.

107. (1760, K. B.) 2 Burr. 1077.

108. *Op. cit.* note 2, at p. 376.

109. See Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 111-119.

110. *Digest*, XLIV, 7, 21.

and that it may express only the Roman law relating to the jurisdiction of courts.¹¹¹

Savigny relied upon the above passage of the Roman law to support the application of the law of the place of performance, but he sought to justify it also on principle.

He contended that a contract has its "seat" at the place where it is to be performed. The place of contracting was in his opinion accidental, transitory, and foreign to the substance of the obligation and to its further development and effect, whereas the whole expectation of the parties is directed to performance. He concluded therefrom that unless the parties have expressed their intention to be governed by some other law, they must be deemed to have contracted with reference to the law of the place of performance.¹¹² Where there is no evidence showing an actual intention of the parties, this assumption is of course a mere fiction.

The arguments advanced by Savigny in favor of the law of the place of performance are unquestionably very weighty, and are especially so where the place of performance is not in doubt.¹¹³ The rule is certain and easy of application and is based

111. (1842) 25 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS, 42-43.

112. "In every obligation, then, we find principally and uniformly two visible phenomena which we might take as our guides. Every obligation arises out of visible facts; every obligation is also fulfilled by visible facts; both of these must happen at one place or another. We can, therefore, select either the place where the obligation has originated, or the place where it is fulfilled, as determining its seat and its forum—either the beginning or the end of the obligation. To which of the two points shall we give the preference upon general principles?

"Not to the origin. This is in itself accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy. If in the eyes of the parties a permanent influence reaching into the future were to be ascribed to the place where the obligation arose, this certainly could not flow from the mere constituent act, but only from the connection of that act with extrinsic circumstances, by which a definite expectation of the parties was directed to that place.

"The case is quite different with respect to the fulfilment, which is indeed the very essence of the obligation. For the obligation consists just in this, that something which was previously in the free choice of a person, is now changed into something necessary,—that which was hitherto uncertain, into a certainty; and when this necessary and certain thing has come to pass, that is just the fulfilment. To this, therefore, the whole expectation of the parties is directed; and it is therefore part of the essence of the obligation that the place of fulfilment is conceived of as the seat of the obligation, that the special forum of the obligation is fixed at this place by voluntary submission." Savigny, *op. cit.* note 11, 198-199.

113. Many eminent writers have accepted Savigny's view. 1 Dernburg, *Pandekten* (7th ed. 1902) 106; 1 *Lehrbuch des bürgerlichen Rechts* (3rd ed. 1906) 111; Barazetti, *Das internationale Privatrecht im bürgerlichen*

upon an internal, instead of an external or casual relationship between the contract and the governing law. Where the place of performance is not fixed, however, the *lex loci solutionis* is less certain than the *lex loci*. In these cases difficult questions of fact concerning the place of performance may arise.¹¹⁴ Where the making of the contract is prohibited by a distinct local policy, such as is involved in legislation forbidding the execution of contracts on Sunday, it is apparent that the law of the place of performance cannot reasonably control.¹¹⁵ The Supreme Court of Wisconsin^{115a} was clearly in error when it denied the validity of a note which had been executed and delivered on Sunday in New York, under the law of which it was valid, because it was payable in Massachusetts, where all executory agreements for the payment of money, including bonds and promissory notes, made and delivered on Sunday were void as between the parties. The Massachusetts statute had obviously exclusive reference to the execution of notes in Massachusetts and did not intend to prescribe a Sunday policy for the state of New York. The rule that the law of the place of performance governs fails completely in the case of bilateral contracts in which each party agrees to perform his part of the agreement in a different state.¹¹⁶ In this class of cases there is no single place of performance which can determine the validity of the contract. The rule fails likewise where a party under an entire and indivisible contract agrees to perform different parts of the contract in different states,¹¹⁷ or where a

Gesetzbuche für das deutsche Reich (1897) 55; 1 Endemann, *Lehrbuch des bürgerlichen Rechts* (9th ed. 1903) 97; 1 Gerber, *System des deutschen Privatrechts* (17th ed. 1895) 41; 1 Gierke, *Deutsches Privatrecht* (1895) 232, notes 65 and 66.

114. Story, *op. cit.* 381 ff.; Minor, *op. cit.*, 377-380. In some countries the place of performance is, under these circumstances, fixed by law. This is, according to Niemeyer, a very complicated legal term. *Op. cit.* note 94, at p. 241.

115. *Arbuckle v. Reaume* (1893) 96 Mich. 243, 55 N. W. 808; *Brown v. Browning* (1886) 15 R. I. 422, 7 Atl. 403.

115a. *Brown v. Gates* (1903) 120 Wis. 349, 97 N. W. 221.

116. Courts and writers accepting the law of the place of performance as the governing law abandon their rule in these cases, and apply either the *lex loci* or some other law. German Imperial Court (Feb. 13, 1891) 47 SEUFFERT'S ARCHIV, 3. See also (Apr. 4, 1908) 68 RG 203; (Apr. 19, 1910) 73 RG 379; (Feb. 4, 1913) 81 RG 273; Neumann, *Internationales Privatrecht* (1896) 91; 2 Zitelmann, *Internationales Privatrecht* (1912) 411.

117. This question has arisen in this country frequently with reference to carriers' contracts, in which the *lex loci contractus* has been commonly substituted for the *lex loci solutionis*. *McDaniel v. Chicago & N. W. Ry.* (1868) 24 Iowa, 412; *Illinois Cent. Ry. v. Beebe* (1898) 174 Ill. 13, 50 N. E. 1019; *Brockway v. American Express Co.* (1898) 171 Mass. 153, 50 N. E. 626; Minor, *op. cit.*, 381.

contract is to be performed either in one state or in another at the option of the promisor.¹¹⁸

3. *View that the personal law should control.*

(1) *The national law of each party.* The view that the common national law of the parties should determine the validity of contracts is supported on principle by the Italian school, which emphasizes the personal quality of law.¹¹⁹

(2) *The national law of the debtor.* Zitelmann, the most extreme advocate of the international theory of law, concludes that the national law of the debtor is the competent law to determine the validity of contracts. He says:

"The obligation results from a command to do or not to do, addressed by objective law to the debtor. With respect to questions arising in the law of obligations the competent law from the standpoint of Private International Law is therefore the law which has the power, according to International Law, to command, and we have seen that, except as to torts, it is the debtor's personal statute (*lex patriae*)."¹²⁰

(3) *The law of the debtor's domicil.* As a result of Bar's influence the law of the debtor's domicil has gained considerable favor as the law governing the validity of contracts.

"This theory . . .," says Bar,¹²¹ "is in principle the correct theory, for this reason, that the general propositions of law in the matter of obligations, the rules which do not give way to the pleasure of the individuals, exist generally in the interest of the debtor. We cannot hold that this protection shall cease on a subject by accident undertaking an obligation in a foreign country, or having to perform one there."

The principal objection to this view is that the assumption that most laws have for their aim the protection of the debtor is unfounded. There is no reason, therefore, why the creditor should submit to the law of the debtor. From a practical viewpoint the rule is open to the same objections as that of the place of performance.

4. *View that the intrinsic validity cannot be determined by*

118. If the promisor fails to perform in either state the place of performance cannot be determined. Meili, *International Civil and Commercial Law* (Kuhn's transl. 1905) 382; Pillet, (1904) 20 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL*, 157; Roguin, *id.*, 79, note.

119. Fusinato, *Il principio della scuola italiana nel diritto privato internazionale* (1884) 33 *ARCHIVO GIURIDICO* 583-584, 3 Weiss, *Traité de droit international privé* (2d ed. 1912) 70 ff.; 4 *id.* 345, 357.

120. 2 *Internationales Privatrecht* (1912) 366. Accord: 1 Crome, *System des deutschen bürgerlichen Rechts* (1900) 137.

121. *Private International Law* (Gillespie's transl. 1892) 543-544.

a single rule. Professor Minor contends that the intrinsic validity of contracts should be determined with reference to the law of the place of contracting if it relates to the making of the contract, by the law of the place of performance if it relates to the performance, and by the law of the situs of the consideration if it relates to the consideration.¹²² For example, if a contract is made on Sunday in a state under the law of which the making of the contract is prohibited, the contract should be regarded as void everywhere.¹²³ If the illegality relates, on the other hand, to the performance of the contract, the law of the place of performance should control.¹²⁴ The validity of an executory consideration is regarded by Professor Minor as governed by principles similar to the above.¹²⁵ As regards executed consideration, the effect of the want of consideration is referred by Professor Minor to the law of the place of contracting,¹²⁶ and the subsequent failure of the consideration, to the law of the place of performance.¹²⁷ The legality of the consideration as affecting the validity of the contract he would determine by the *lex loci considerationis*.¹²⁸

5. *View that the intrinsic validity of a contract should be determined by the law of the state with which the contract has the most real connection.* Westlake is of the opinion that this view is supported by the English courts.¹²⁹

6. *View that the validity of a contract is governed by the law under which the parties contract, the bona fide intention of the parties being the main element in determining what that law is.* Professor Dicey feels that the English decisions sustain this view.¹³⁰

7. *View that the contract should be regarded as invalid unless it satisfies the local law of all states with which it is connected.* This view has been proposed with respect to contracts made by correspondence.¹³¹

8. *Jitta's view.* Jitta's method for the solution of the problems arising from contracts in their international relations is unique and deserves a brief notice. It can best be stated in his own words:¹³²

122. Minor, *op. cit.*, 401-402.

123. *Id.*, 403.

125. *Id.*, 421.

127. *Id.*, 425.

129. Westlake, *Private International Law* (5th ed. 1912) 305.

130. Dicey, *op. cit.* note 92, at p. 545-546, 814 ff.

131. Hindenburg, *Revue de droit international et de législation comparée*, 263, 285; Jettel, *Handbuch des internationalen Privat- und Strafrechts* (1893) 108-109; Barazetti, *op. cit.* note 20, at pp. 54-55; 2 Zitelmann, *op. cit.* note 24, at p. 164.

132. 1 *La substance des obligations dans le droit international privé* (1906) 20-23.

124. *Id.*, 404-405, 418-421.

126. *Id.*, 424-425.

128. *Id.*, 427-429.

"From my point of view private international law is not the science of the conflict of laws, but the private law itself considered from the point of view of the requirements of the juridical community of mankind. The solution of the conflicts, the reference to the law of state X or to the law of state Z, is a means and not an end. The reference furnishes only the lesser half of the solution, i. e., certainty as regards the rule to be applied; but such certainty all rules afford, even the most mechanical ones. In order to gain the other half of the solution, i. e., the harmony between the rule and actual life, it is necessary that the law to be applied be calculated to assure the reasonable order of society, a condition which a mechanical rule, referring to a certain law, does not necessarily fulfil, and which may necessitate the formulation of a juridical rule, independent of the laws which are said to be in conflict. The application of a foreign law should take place only if such application is demanded by a reasonable order of the universal society. . . .

"A juridical relation presents itself from a national point of view if it belongs from the standpoint of the legislator or judge to the active local life for which the national law has been established in the first place. . . . In this sphere of action the judge will apply without hesitation the law of his country, for the state whose organ he is considers the application of this law certainly as a requirement of the reasonable order of this society. . . .

"States and judges may find themselves face to face with juridical relations belonging to the active local life of a foreign country . . . Respect for the foreign law imposes itself with regard to these juridical relations, except where considerations of a universal public order are opposed. . . .

"Finally, a juridical relation may not belong to the active local life of a society but to the active, international or universal life. . . . The judge or state whose organ he is, is under a duty to apply to the international juridical relationship the law belonging to it in the universal active life. . . . Such law (*droit*) may be identical either with the law (*loi*) of a certain country, (that of the country in which the judge is sitting is not excluded if the juridical requirements of the universal social life refer to it) or it may be an independent provision which is derived from a consideration of the local public order and the universal public order."

In accordance with the method above set forth, Jitta rejects all general rules like those of the law of the place of contracting, the law of the place of performance, the national law or the law of the domicil as too mechanical. He inquires instead first of all whether the particular relationship in question can be localized. If it belongs to the local sphere of a particular law he applies the law of that state, subject to its rules of public policy. If it does not belong to a local sphere, but to the international sphere, he applies what he calls the international-common rules, and in the absence of such rules, the reasonable

principles, limited by the requirements of the universal public order.¹³³

The above is a summary of the principal rules or methods by means of which the intrinsic validity of contracts may be determined. Which of these should be adopted by the English and American courts? Some can be eliminated without difficulty. This is true first of all of Jitta's proposed method of solving the problem, which leaves the judge practically without any definite guide to go by. The view also which requires a contract to satisfy the law of all the states with which it is connected cannot be seriously considered. Sound policy suggests that international transactions be sustained as far as possible, instead of being defeated. The *lex patriae* also cannot be approved because it is out of harmony with the fundamental conceptions of Anglo-American law. The law of the domicil of the debtor rests upon the erroneous assumption that most laws are enacted for the benefit of the debtor, and is open to other objections, which make it unacceptable. The choice lies, therefore, between the adoption of the law of the place of contracting or of the law of the place of performance, on the one hand, and the views supported by Minor, Westlake, and Dicey, on the other. As has been shown above, the exclusive application of either the law of the place of contracting or of the law of the place of performance will not solve satisfactorily the different questions arising in connection with the intrinsic validity of contracts. The former rule is unsuitable where the *performance* of the contract is illegal, for in this case the law of the place of performance is clearly the proper rule.¹³⁴ For a similar reason the law of the place of performance cannot reasonably apply where the *execution* of the contract is prohibited by a stringent local policy existing at the place of execution.¹³⁵ To this extent it

133. 2 *id.* 506; *The Renovation of International Law* (1919) 138.

134. Courts and writers appear to agree on this rule. *Western Union Tel. Co. v. Way* (1887) 83 Ala. 542; Minor, *op. cit.*, 418-421; Dicey, *op. cit.*, 553; Harburger and Bar, (1900) 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 50.

The same rule should apply on principle if the performance becomes illegal subsequently to the execution of the contract. *Ralli Bros. v. Compania Naviera Sota y Aznar* (1920, C. A.) 25 Times C. C. 227; cf. *Jacobs v. Crédit Lyonnais* (1884) L. R. 12 Q. B. Div. 589; Dicey, *op. cit.*, 554. *Contra: Tweedie Trading Co. v. McDonald* (1902, S. D. N. Y.) 114 Fed. 985; *Richards & Co. v. Wreschner* (1916) 174 App. Div. 484, 156 N. Y. Supp. 1054.

Dicey thinks that the rule would not be applied by the English courts to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign country not forming part of the British Dominions. *Op. cit.*, 553. Anson takes a contrary view. *Contract* (Corbin's ed. 1919) 287-288.

135. As, for example, the policy prohibiting the execution of contracts on Sunday. *Arbuckle v. Reaume*, *supra* note 22.

would seem necessary therefore to recognize both the *lex loci contractus* and the *lex loci solutionis*.

The problem is thus narrowed down to the following: What law shall govern the intrinsic validity of contracts in so far as the question does not fall within a stringent local policy existing either at the place of contracting or at the place of performance? It is submitted that neither the *lex loci contractus* nor the *lex loci solutionis* will furnish a satisfactory solution in these cases. The law of the place of performance has the advantage of possessing an internal relationship with the contract, but to apply it gives rise to much uncertainty where the place of performance is not fixed, and the rule is impossible of application in the case of bilateral contracts in which each party agrees to perform in a different state, and in other cases. The *lex loci* is certain and easy of application, but as an absolute rule it does not always bring about desirable results. The case of *Pritchard v. Norton*,¹³⁶ referred to in a preceding article, may serve as an illustration. The defendant in that case executed and delivered to the plaintiff a bond of indemnity in the state of New York in which he undertook to indemnify him against all loss arising from his liability as surety upon an appeal bond executed by him on behalf of the defendant as appellant in a suit then pending in Louisiana. The plaintiff, having become liable on the appeal bond, and having paid the amount due, brought an action against the defendant for the recovery of the amount. The defendant set up by way of defense that the bond sued on was without consideration and void under the laws of the state of New York. If the intrinsic validity of contracts is to be governed absolutely by the *lex loci*, the defendant would escape liability under the facts of this case, but it would seem that in all fairness he ought to be held. The defendant would be liable if the *lex loci solutionis* were applied. This rule would render the indemnity bond invalid, however, if the original litigation had been brought in New York and the indemnity bond had been executed in Louisiana, and that would be unfortunate. The Supreme Court of the United States sustained the validity of the indemnity bond in the above case by adopting the intention theory and holding that the parties must have contracted, in view of all the circumstances, with reference to the law of Louisiana.

Professor Minor¹³⁷ supports the decision in *Pritchard v. Norton* because, according to him, the situs of the consideration was in Louisiana. The opinion of the Supreme Court of the United States does not suggest, however, that the consideration of a contract may be governed in a case like the one before

136. (1882) 106 U. S. 124, 1 Sup. Ct. 102.

137. *Op. cit.*, 426-427.

the court by a separate law, but placed its decision in part on the intention theory and in part upon the fact that Louisiana was the place of performance. Pritchard's antecedent debt was contracted in Louisiana, but the defendant's promise to indemnify him was given in New York. The question was, therefore, whether a past consideration would support the promise, and this question was naturally determined by the court with reference to the law governing the intrinsic validity of the contract itself. Professor Minor's contention, that the validity of a contract as regards the question of consideration must be controlled by the law of the situs of the consideration irrespective of the law of the place where the contract was made or was to be performed, has no support from the cases.¹³⁸ English and American courts have not separated the element of consideration from the other elements making up the intrinsic validity of contracts, and have not subjected the contract in that regard to the law of the situs of the consideration, but they have invariably regarded the law governing the contract in general as controlling also with respect to the consideration. Where a note is given in state X for a debt incurred in state Y, the defence being that the debt is illegal and void, the courts will determine the illegality of the debt of course with reference to the law of state Y, which governed the contract out of which the debt arose. The question, however, whether such a debt can support the contract made in state X is determined by the law of the latter state.

Cases like the above show the necessity of finding a rule with greater flexibility than that possessed by any of the rules so far considered, excepting Jitta's. If this conclusion is sound, the final choice will lie between the views formulated by Westlake and Dicey and an alternative rule. Westlake's and Dicey's views are both based upon the decisions of the English courts and agree in determining the law under which a contract was made from the surrounding circumstances of the case. The English courts are in the habit of speaking about the law intended by the parties, or the law which the parties ought to be presumed to have intended, in view of the attendant circumstances; the question is, therefore, whether this is merely a way of stating that the law of the state with which the contract is deemed to have the closest connection governs the intrinsic validity of contracts without reference to the actual intention of the parties; or whether their intention is a material factor in the determination of the law. Westlake takes the former view of the English law. The solution is theoretically sound, but from a practical point of view it is open to the objection that the gov-

138. Wharton, *Conflict of Laws* (3rd ed. 1905) 1192-1194.

erning law is made to depend upon an appreciation of all the facts of the case, in regard to which different inferences will be drawn by different courts. The validity or invalidity of a contract must under this rule remain uncertain in many cases until the question has been decided by the courts. If a rule is to be found which will produce greater certainty, a choice must be made between the intention theory and a rule in the alternative. The theoretical objections to the intention theory have been mentioned above.¹³⁹ From the standpoint of practical convenience it has the advantage of being a flexible rule which can take into consideration the needs of the particular case. Unless it is interpreted, however, as supporting any contract which is valid under any law with which the contract has a substantial connection, i. e. as practically equivalent to the alternative rule to be proposed, it is open to the same objection as the rule just discussed. Dicey's statement of the intention theory is subject to this criticism. He maintains that persons who really contract under one law cannot by any device render valid a contract which that law treats as invalid. Where a contract is made in England and has no connection with France, the parties cannot validly stipulate that its intrinsic validity shall be determined by French law, but if the contract is connected with France—if, for example, the place of performance is in that country—the bona fide intention of the parties is, according to Dicey, the chief element in determining whether the contract is an English contract or a French contract. Dicey adds, however :¹⁴⁰

"If it is clear they meant to contract under one law, e. g. the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the court, their real intention was to enter into an English contract."

The parties cannot, therefore, directly determine by their choice whether a contract shall be legal or not. All they can do is to determine what is the law under which they in fact contract, and this question must be decided by the courts in the light of all the surrounding circumstances. The necessity of such an examination into and appreciation of the facts makes the ultimate decision of the case necessarily doubtful, and this renders the intention theory in this form open, from the standpoint of certainty, to the same objections as was Westlake's view.

140. *Op. cit.*, 820.

139. *Supra* p. 282

There is in the opinion of the writer but one way to get a rule that is certain and is yet sufficiently elastic to be able to sustain a contract like that in *Pritchard v. Norton*, even if the facts of the latter case were reversed, and that is by regarding contracts as valid if they satisfy the law of any state with which they have a substantial connection. No case has gone quite so far as this. There is a considerable amount of dicta, however, to the effect that there is a presumption that the parties contracted with a view to the law of the state that will sustain the contract.¹⁴¹ As regards usury the American cases have virtually allowed the parties to contract with reference to the law of any state with which the contract has a substantial connection.¹⁴² Although Anglo-American courts have been disinclined to lay down alternative rules for the solution of any question in the conflict of laws, such a rule was adopted in the case of *In re Hellmann's Will*,¹⁴³ in which a German legatee under an English will was permitted to receive his property when he was of age either under English law or under German law. Alternative rules have been adopted also by statute in England with respect to the formal requirements of wills relating to movable property and in this country with respect to the execution of deeds and wills.¹⁴⁴ The adoption of an alternative rule with respect to the intrinsic validity of contracts offers a practical means of solving a most difficult problem in the Conflict of Laws by a rule which is not open to the theoretical objection raised against the intention theory and which is sufficiently certain and elastic to sustain contracts which in fairness should be sustained. It is submitted, therefore

1. That the intrinsic validity of contracts should be recognized if the local ¹⁴⁵ law of any state with which the contract has a substantial connection be satisfied.

2. That such contracts be regarded as invalid

- a. if their execution is prohibited by some stringent policy of the place of contracting;
- b. if their performance is illegal under the law of the place of performance.

141. See, for example, *Pritchard v. Norton*, *supra* note 44.

142. *Miller v. Tiffany* (1863, U. S.) 1 Wall. 298; *Arnold v. Potter* (1867) 22 Iowa, 194; *Scott v. Perlee* (1883) 39 Oh. St. 63.

143. (1866) L. R. 2 Eq. 363.

144. (1911) 20 YALE LAW JOURNAL, 432-437.

145. I. e., to the exclusion of the rules of the conflict of laws of the foreign country. As to "renvoi" see (1910) 10 COL. L. REV. 190, 327; (1918) 27 YALE LAW JOURNAL, 509; (1919) 29 *id.* 214; (1918) 31 HARV. L. REV. 523.

If the direct recognition of the alternative rule suggested should appear to our courts to be too radical an innovation, the same end can be attained in a less scientific way by a general recognition of the intention theory, as it is understood in the usury cases, with a *prima facie* presumption that the parties contracted with reference to the law that will sustain the contract.

The same principles should control where the validity or invalidity does not concern the contract as a whole, but only some particular provision.¹⁴⁶

The above discussion has been confined to the determination of the law that should govern the validity or invalidity of contracts on principle. The conclusion reached must be understood, of course, to be subject to the qualification that a contract, whether valid by its proper law or not, will not be enforced if it is deemed to conflict with the essential public or moral interests of the forum.¹⁴⁷

III

LAW GOVERNING MEETING OF MINDS

A question may arise whether there was in legal contemplation a meeting of minds. Suppose that A in New York makes an offer to B in Germany by mail, and that he revokes it by cable after B has received the letter containing the offer. Under the German law A is bound by his offer if it is accepted within the period within which A would under ordinary circumstances expect an answer.¹⁴⁸ If the transmission of a letter between New York and Germany takes two weeks B could accept the offer by cable at any time before the expiration of the two weeks after the receipt of the offer. Under the law of New York A is not bound by his offer and can withdraw it at any time before it is accepted. If B accepts the offer within the period mentioned, has a contract been formed? It has been said that the offeror is deemed present in the state in which his offer has been received, and the conclusion has been drawn that A's duty to keep his offer open should be governed in the above case by

146. See, for example, *In re Missouri S. S. Co.* (1889) L. R. 42 Ch. Div. 321; *Grand v. Livingston* (1896) 4 App. Div. 589, 38 N. Y. Supp. 490; *Davis v. Aetna Mut. Fire Ins. Co.* (1892) 67 N. H. 218, 34 Atl. 464; Cassation, France, (Dec. 5, 1910), (1911) 7 REVUE DE DROIT INTERNATIONAL PRIVÉ, 395.

147. Judge Beach maintains that there is no rational basis for such a qualification as between the different states of our own country. *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE LAW JOURNAL, 656.

148. German Civil Code, Sec. 147.

German law.¹⁴⁹ Such a deduction involves, however, a process of reasoning that starts from a false premise. If the law of the forum regards the contract as made in the state from which the acceptance is sent, in our case, Germany, the consequences will be the same, of course, as if A had made the offer in person in Germany. But the preliminary question, *where* the contract was made, is actually decided by the law of the forum without reference to the German law. If the German law had been consulted the contract would have been made in New York.¹⁵⁰ For the same reason the law of the forum must determine, in accordance with its own views, the preliminary question regarding the binding nature of an offer. There is no more reason why the court should consult German law on this point than there was in determining the situs of the contract. These preliminary questions must in the nature of things be determined by each court in accordance with its own law,¹⁵¹ except perhaps where a contract is concluded between two foreign states or nations whose laws agree on the subject.¹⁵² The other possible alternative, that of requiring compliance with the law of both states under all circumstances, does not commend itself because it restricts too greatly the formation of contracts from an international point of view.

IV

LAW GOVERNING THE EFFECTS OF CONTRACTS

If the validity of the contract and of its provisions is admitted and the question relates to the rights, duties, etc., arising out of such a contract, i. e. its effects, there can be no doubt that the intention of the parties is the controlling factor. The parties are perfectly free to agree upon the nature of the contract, its effect, its performance, and the consequences resulting from non-performance, so far as dispositive provisions of law are concerned, that is, provisions in regard to which the parties have full freedom to contract. If the parties have clearly expressed themselves on the subject, the matter is free from difficulty, and is simply one of interpretation or proof. Where the parties have defined their rights, duties, etc., however, by ref-

149. Hibbert, *International Private Law* (1918) 130; Cohen, *Des Contrats par Correspondance en Droit Français en Droit Anglais et en Droit Anglo-Américain* (1921) 178.

150. According to German law the contract is not deemed made until the letter of acceptance reaches the offeror. 1 Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, (7th & 8th eds. 1912) 567.

151. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 Col. L. Rev. 247-282.

152. *Id.*, 281.

erence to some particular foreign law, a question may arise whether they should be allowed absolute freedom in the selection of such law, or whether they should be limited in their choice to the law of the countries that have an actual connection with the contract.¹⁵³

If the parties have not expressed themselves regarding the law that shall determine the extent of their rights, duties, etc., their intention may appear from the terms of the contract in the light of surrounding circumstances. However expressed, the actual will of the parties controls.¹⁵⁴

What is to be done, however, in the ordinary case where it is apparent that the parties did not think at all about the legal effect of their contract? In such cases the law may take one of two courses. It may content itself with adopting the general rule that the law of the state with which the contract has the closest connection shall control,¹⁵⁵ or it may lay down more specific rules. The method which leaves the question to the courts as a question of fact has the seeming advantage that it permits the working out of justice in each particular case, but its great weakness is that the parties cannot know before the decision of the question by the courts what their rights under the contract are. As the conclusion of the court will depend upon an appreciation of all the surrounding circumstances, it is impossible to anticipate with any degree of certainty the decision of a case. As an escape from this situation, courts and legislatures have adopted subordinate rules of law or presumptions. Courts and writers taking this view are agreed that the law so chosen should be the law which the parties as reasonable men probably would have intended to apply had their attention been directed to the matter.¹⁵⁶ But when it comes to the selection of the rule or rules there is the greatest difference of opinion.

A. Presumption in Favor of the Personal Law

(1) *Common National Law.* Many of the Italian and French writers are of the opinion that, where the parties have the same

153. As the parties must prove the foreign law, there would appear to be no good reason why they should be restricted in their choice. Bustamante, *La Autarquía Personal* (1914) 110; 1 Rolin, *Principes de Droit International Privé* (1897) 437; 4 Weiss, *Traité de Droit International Privé* (2d ed. 1912) 354.

154. Dicey, *Conflict of Laws* (2d ed. 1908) 529, 556.

155. This appears to be essentially the practice of the English courts. Westlake stated before the Institute of International Law that the English judges could not be tied down by any presumption. (1904) 20 *ANNUAIRE*, 169.

156. Pillet, *Principes de Droit International Privé* (1903) 440.

nationality and do not express their intention regarding the law that shall control their rights, they tacitly contract with reference to their common national law.¹⁵⁷ They hold, therefore, that, whenever the facts of a case do not point to a different conclusion, a presumption should exist in favor of their *lex patriae*. These writers reach different conclusions, however, concerning the presumption to be adopted if the parties do not possess the same nationality. Some hold that the parties must have contracted in such a situation with a view to the *lex loci*.¹⁵⁸ Others are of the opinion that if the parties have the same domicile it is more reasonable to assume that they contracted with reference to that law, especially where it has been established a long time.¹⁵⁹ Still others make a distinction between bilateral and unilateral contracts, and submit the former to the *lex loci* and the latter to the personal law of the debtor.¹⁶⁰ Where the parties have no common nationality and no common domicile, but one of the contracting parties has a domicile in the country to which the other belongs, some writers believe that the law of the latter state expresses the probable intention of the parties.¹⁶¹ If the case does not fall within any of the above classes, some writers prefer the law of the place of performance to the law of the place of contracting, where the contract had merely a casual connection with the *lex loci contractus*.¹⁶²

(2) *Common Domiciliary Law*. Some writers contend that the application of the *lex patriae* does not rest upon a reasonable basis. They urge that contracts have nothing to do with national characteristics or traditions, but belong exclusively to the economic life of an individual, which centers about his domicile. Where the parties have not expressed their intention

157. Durand, *Essai de Droit International Privé* (1884) 420; Despagne, *Précis de Droit International Privé* (5th ed. 1909) 881-882; Jarassé, *Essai sur la Substance et les Effets des Conventions en Droit International Privé* (1886) 58; 2 Laurent, *Le Droit Civil International* (1881) 413-414; Surville et Arthuys, *Cours Élémentaire de Droit International Privé* (6th ed. 1915) 298-299. Meili would apply the common national law with the proviso that the parties at the time of contracting were aware of their common nationality. 2 Meili, *Das Internationale Zivil und Handelsrecht* (1902) 16.

158. Bard, *Précis de Droit International Pénal et Privé* (1883) 266; Despagne, *op. cit.*, 882; Durand, *op. cit.*, 420; 2 Laurent, *op. cit.*, 414-416.

159. Jarassé, *op. cit.*, 58; Surville et Arthuys, *op. cit.*, 302; 3 Weiss, *op. cit.*, 356.

160. 1 Foelix, *Traité de Droit International Privé* (4th ed. 1866) 159, 227; 1 Fiore, *Le Droit International Privé* (Antoine's transl. 1907) 157. *Contra*: Demangeat sur Foelix, 230, note b; Despagne, *op. cit.*, 885-886; Dreyfus, *L'Acte Juridique dans le Droit International Privé* (1904) 303.

161. Surville et Arthuys, *op. cit.*, 302.

162. *Id.*, 302.

it is reasonable to assume, therefore, according to these writers, that they would have chosen the law of their common domicile as the law governing their legal relations.¹⁶³ Some writers prefer the law of the common nationality if the common domicile was not long established.¹⁶⁴ In the absence of a common domicile some prefer the *lex loci*,¹⁶⁵ while others raise a presumption in favor of the *lex patriae* if the contracting parties have the same nationality, and support the *lex loci* only if the parties have no common domicile or nationality.¹⁶⁶ Where the *lex loci contractus* has only an accidental connection with the contract, some of the above writers would determine the rights of the parties with reference to the law of the place of performance.¹⁶⁷

(3) *Bustamante's View*: Bustamante is of the opinion that an unqualified preference should be given neither to the law of the common nationality nor to that of the common domicile. Where the parties have the same nationality and the same domicile and the contract is made in one of these states, Bustamante thinks that the parties must be deemed to have contracted with reference to that law.¹⁶⁸ In the same way, where they have the same nationality, but different domiciles, or the same domicile but different nationalities, and the *locus contractus* is in the country that is common to the parties, the presumption should be in favor of such state.¹⁶⁹ Where the parties have the same nationality and the same domicile and the contract is made in neither state nor country, Bustamante would choose the personal law in accordance with his view concerning laws of internal public order which are personal as regards their object.¹⁷⁰ If the parties have neither a common

163. Asser, *Éléments de Droit International Privé* (Rivier's transl. 1884) 75; Chausse (1897) 24 CLUNET, 1, 26; Jarassé, *op. cit.*, 58; Pillet, *Cours de Droit International Privé* (1905) 325; *Principes*, 441; (1908) 22 ANNUAIRE, 80; 1 Rolin, *op. cit.*, 470-471, 511-514; Valéry, *Manuel de Droit International Privé* (1914) 985. In the absence of a common domicile some prefer the *lex loci*. Asser, *op. cit.*, 73, 75; Pillet, *Cours*, 327. Others, the common national law. 1 Rolin, *op. cit.*, 470.

164. Audinet, *Principes Élémentaires du Droit International Privé* (2d ed. 1906) 283; Bossion, *Du Conflict des Lois en ce qui Concerne la Substance des Obligations Conventionnelles* (1884) 188; Verdia, *Tratado Elemental de Derecho Internacional Privado* (1908) 177-178; 4 Weiss, *op. cit.*, 355-356.

165. Pillet, *Cours*, 327; *Principes* 441; (1904) 20 ANNUAIRE, 157.

166. Jarassé, *op. cit.*, 58; 1 Rolin, *op. cit.*, 470.

167. Pillet (1904) 20 ANNUAIRE, 157.

168. Bustamante, *op. cit.*, 142.

169. *Id.*, 143.

170. *Id.*, 142-143.

nationality nor a common domicile, Bustamante favors the application of the *lex loci*.¹⁷¹

(4) *Law of Debtor's Domicil*: A good many writers contend that if the parties have not entered into an express stipulation as to the governing law, and their actual intention does not appear from the facts of the case, they must be deemed to have contracted with a view to the law of the debtor's domicile.¹⁷² In justification of this presumption, Bar alleges the following:¹⁷³

"In so far, however, as there is a question of the interpretation to be put on the intention of the parties, we must unquestionably proceed upon the footing, that every person expresses himself in accordance with the law and the statutes which he knows, and has recourse therefore to the law to which he is personally attached. This rule of interpretation is applied in cases of unilateral obligations or transactions, especially in *mortis causa* settlements, even by those who propose to construe contract obligations by the *lex loci contractus*, or by the law which prevails at the place of performance.

Lastly, the view we have here maintained is supported by the fact that in very many cases, and in particular where no other place of performance is specially stipulated, the domicile of the debtor is the place of performance, and that in by far the greater number of cases, action to compel performance of a personal obligation, with a view to the possibility of ultimate execution, is brought at the domicile of the debtor."

B. Law of the Place of Performance

In this country and in Germany most courts and many writers, following Story and Savigny,¹⁷⁴ hold that, where there is no proof of an actual intention, the parties must be deemed to have contracted with reference to the law of the place of performance. This conclusion is based by Savigny upon the theory that the parties, as reasonable men, if they had thought of the matter, would have naturally chosen the law of the place with which the contract had the most vital connection, and this is deemed to be the law of the place of performance, because the

171. *Id.*, 144.

172. Bar, *Private International law* (Gillespie's transl. 1892) 544; 1 Crome, *op. cit.*, 148 and note 44; Harburger (1902) 19 ANNUAIRE, 141; Klöppel (1890) ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT- UND STRAFRECHT, 197; Neumann, *Internationales Privatrecht* (1896) 89; Regelsberger, *Pandekten* (1893) 174; 1 Stobbe, *Deutsches Privatrecht* (3d ed. 1893) 261; Windscheid, *Pandekten* (9th ed. 1906) 146.

173. Bar, *op. cit.*, 544.

174. See *supra*, 30 YALE LAW JOURNAL, 574, 577.

whole expectation of the parties is regarded as being directed to the performance of the contract.¹⁷⁵

C. Law of the Place of Contracting

Some of the English courts hold that the law of the country where a contract is made governs its effects in the absence of anything to show a contrary intention.¹⁷⁶ This presumption applies with special force where the contract is made in England. Where the contract is made in one country and is to be performed either wholly or partially in another, great weight is given to the law of the place of performance, especially as to the mode of performance.¹⁷⁷ A few states in this country also apply the law of the place of contracting.¹⁷⁸

So far as the *lex loci* is followed on the continent, it is usually given a subordinate place, and is invoked only in the absence of a common nationality or a common domicil,¹⁷⁹ refuge being generally taken to the law of the place of contracting only as a means of last resort. This tendency is particularly noticeable in contracts by correspondence. In this class of cases the *lex loci* is often ignored altogether, its place being taken either by the law of the state from which the offer was dispatched,¹⁸⁰ by the

175. *Accord*: Algara, *Lecciones de Derecho Internacional Privado* (1899) 187; Barazetti, *Das Internationale Privatrecht im Bürgerlichen Gesetzbuche für das Deutsche Reich* (1897) 55; Boyens (1898) 4 VERHANDLUNGEN DES 24 DEUTSCHEN JURISTENTAGES 112 ff.; Carrio, *Apuntes de Derecho Internacional Privado* (1911) 187 ff.; 1 Dernburg, *Das Bürgerliche Recht* (3d ed. 1906) 111; Enneccerus, (1898) 4 VERHANDLUNGEN DES 24 DEUTSCHEN JURISTENTAGES 85, 119; Gerber, *System des Deutschen Privatrechts* (17th ed. 1895) 41; Gierke, *Deutsches Privatrecht* (1895) 231-232; Krohn, *Die Vertragsobligationen in Materieller Beziehung nach Deutschem Internationalen Privatrecht* (1909) 92.

176. *Jacobs v. Crédit Lyonnais* (1884, C. A.) L. R. 12 Q. B. Div. 589. Contracts of affreightment are presumed to be entered into with reference to the law of the flag. *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115.

177. *Chatenay v. Brazilian Submarine Co.* [1891, C. A.] 1 Q. B. 79; *Hamlyn v. Talisker Distillery* [1894, H. L.] A. C. 202; Dicey, *op. cit.*, 565-566.

178. Beale, *What Law Governs the Validity of a Contract* II (1910) 23 HARV. L. REV. 194, 207.

179. See *supra*, 30 YALE LAW JOURNAL, 567-570. This is especially true of the French and Italian writers. Compare, 1 Förster-Eccius, *Preussisches Privatrecht* (7th ed. 1896) 62; Niemeyer, *op. cit.*, (1895) 241; (1899) 3 DEUTSCHE JURISTENZEITUNG 373; Schöffner, *Entwicklung des Internationalen Privatrechts* (1841) 108-109; Vareilles-Sommières, *La Synthèse du Droit International Privé* (1897) 228.

180. Japan, Art. 9, Law concerning the Application of Laws in General; De Becker, *International Private Law of Japan* (1919) 98. If, however, the recipient of the offer was ignorant, at the time of his acceptance, of

law of the domicile of the offeror,¹⁸¹ or of the party who took the preponderating part in the negotiations,¹⁸² or by the law of the state which would postpone the formation of the contract longest,¹⁸³ or by some other law.¹⁸⁴

The above rules are laid down generally as *prima facie* presumptions or as mere guides for the courts, in the absence of an express agreement regarding the governing law or of circumstances from which a contrary intention may be inferred. Whenever the parties have chosen a particular law, or the court is satisfied that if they had thought of the matter, they would probably have contracted, as reasonable men, with reference to some other law than that pointed out by the *prima facie* presumption, such law will control. In this country there is a tendency to regard the *lex loci contractus* and the *lex loci solutionis* as fixed rules of law, for in the great majority of cases the courts do not inquire into the attendant circumstances.

The practical advantages and disadvantages of the presumptions above mentioned have been indicated in the main in the discussion of the intrinsic validity of contracts. So far as this country is concerned, only three of the above rules are entitled to serious consideration, viz. the law of the common domicile of the parties, the law of the place of performance, and the law of the place of execution. The adoption of the law of the common nationality of the parties would be absolutely impracticable. Even in continental countries in which the principle of nationality has been accepted in the conflict of laws, it is realized that its application to the law of contracts is unwarranted in view of the fact that contracts affect the economic life of a person, which has little if anything to do with nationality. The *lex*

the place from which the offer had been despatched, the place of the offeror's domicile is regarded as the place of the act. *Ibid.*

181. Cass. Turin, Jan. 13, 1891, (1891) 18 CLUNET, 1026. Institute of International Law (1908) 22 ANNUAIRE, 291. Where the original offer is modified in the course of the negotiations, the law of the domicile of the party making the last offer governs. Neumann, *op. cit.*, 6, sec. 15, 86.

182. Surville (1891) 18 CLUNET, 371.

183. Bartin (1897) 24 CLUNET, 476; Chrétien (1891) 18 CLUNET, 1028; Dreyfus, *op. cit.*, 363.

184. For example, according to Ferron, the law of the place to which the offer is addressed should be applied as the law of the place where the offer is in fact made. The author contends that making an offer by mail is the same as if the offeror were physically present in the state to which the letter is sent. (1901) 50 REVUE CRITIQUE, 429-430. A. Cohen, the latest writer on the subject, concludes that it is impossible to choose a definite law and that the governing law should be the one which the parties would probably have preferred in the light of all the attendant circumstances. *Des Contrats par Correspondence en Droit Français, en Droit Anglais et en Droit Anglo-Américain* (1921) 178.

domicilii of the debtor also, suggested by Bar, is unacceptable, for there would appear to be no reason why the law of the debtor's domicil should be preferred to that of the creditor. Of the remaining rules, the law of the common domicil of the parties has no support in this country, although a good deal might be said in its favor, except for the special conditions prevailing here. On the continent the domicil of the party is the center of his affairs.¹⁸⁵ With us it is a person's home and very frequently the home is in a different state from a person's place of business. With us a person has, not infrequently, residences in different states, or he may have a residence in one state and his domicil in another, the result being that the determination of the domicil of the parties is often a matter of great difficulty. Because of these practical considerations our courts have rejected the *lex domicilii* even as regards capacity to contract, with respect to which it has been the traditional rule on the continent for centuries.¹⁸⁶

In this country opinion has been divided between the law of the place of performance and that of the place where the contract was executed, the majority of the courts supporting the former rule. Where the place of performance is agreed upon or appears with certainty from the contract, the adoption of the *lex loci solutionis* furnishes a simple and certain rule.¹⁸⁷ It loses these characteristics, however, when the place of performance is not indicated and has to be inferred from attendant circumstances¹⁸⁸ or to be derived from particular rules of law.¹⁸⁹ With respect to bilateral contracts, in which each party has agreed to perform in a different state, the *lex loci solutionis* cannot be consistently applied at all, for it would logically require that the duties of each party be subject to the law of the place in which he agreed to perform, and thus cause essentially dependent promises to be subject to different laws. Our courts do not seem to have faced this problem, which becomes most acute in the law

185. See Lorenzen, *op. cit.*, 20 COL. L. REV. 248.

186. To-day the law of nationality has been commonly substituted for that of domicil.

187. Mitteis, 4 VERHANDLUNGEN DES 24 JURISTENTAGES, 103; Pillet (1904) 20 ANNUAIRE, 154; Valery, *op. cit.*, 981. According to Story also, if no place of performance is indicated, or the contract may indifferently be performed anywhere, the contract ought to be referred to the *lex loci contractus*. Story, *Conflict of Laws* (8th ed. 1883) 381.

188. Concerning the ascertainment of the *lex loci solutionis*, see Minor, *Conflict of Laws* (1901) 377, 378; Story, *op. cit.*, 381-383.

189. See, for example, German Civil Code, sec. 269. The "place of performance" is a difficult and complicated legal term. Niemeyer, *Vorschläge und Materialien* (1895) 241; (1898) 3 DEUTSCHE JURISTENZEITUNG, 373; 2 Zitelmann, *Internationales Privatrecht* (1912) 372.

of sales, and have avoided it in this class of cases by abandoning the *lex loci solutionis* for the law of the place where the title of the chattel passes.¹⁹⁰ An application of the law of the place of performance of each party to a bilateral contract may lead to discrepant results. For example, the law of the buyer's place of performance may throw the risk of the subject matter sold on the buyer, while the law of the seller's place of performance may throw it on the seller. Again, one party may be entitled to demand performance by virtue of the law of the place of performance of the other contracting party, while he may not be bound at all according to the law of his place of performance. The German courts and writers have made the most strenuous efforts to extricate themselves from this embarrassing situation. Bar, who argues this question from the standpoint of the law of the debtor's domicile, makes the following observations in regard to the question of risk:¹⁹¹

"We have, however, precisely the same difficulty if two express provisions at variance with each other find their way into a contract, and no interpretation sought from other circumstances avails to give exclusive validity to the one or to the other. The decision must be in favor of the defender, since the pursuer has certainly not made out his case."

Windscheid also, who, like Bar, accepts the *lex domicilii* of the debtor in lieu of the law of the place of performance, would apparently reach the same result by granting to the debtor in all cases an option to rely either upon his own law or upon that of the creditor. He says:¹⁹²

"As, however, the creditor is the person who is the claimant, he must, in order that he may recover anything, accept the law of the debtor's domicile, if he, the debtor, insists upon the application of this law; but conversely the law of his, the creditor's own domicile, may have to be taken, if it suits the debtor to appeal to it."

Speaking of the case where one party is entitled to demand performance by virtue of the law of the place of performance of the other contracting party when he is not bound at all by the law of his own place of performance, Bar says:¹⁹³

190. *Ladd v. Dulany* (1809, C. C. D. C.) 1 Cranch, C. C. 583; *Kline v. Baker* (1868) 99 Mass. 253; *Jaffray v. Wolf* (1895) 4 Okl. 303, 47 Pac. 496; *McIlwaine v. Legaré* (1884) 36 La. Ann. 359.

191. Bar, *op. cit.*, 546.

192. Windscheid, *Pandekten* (9th ed. 1906) 146.

193. Bar, *op. cit.*, 546.

"But in every contract the undertaking of the one party depends upon that of the other; the one has only validly bound himself in so far as the other is bound to carry out his undertaking. He can, therefore, if he is called upon to do his part, demand that the other party shall either do his first (if this is sufficient, as it often is, to bar any subsequent challenge of the transaction), or bind himself in some way that is recognized by the law of his domicil. If, however, the party who is truly bound has already performed his part, and if, by the law of the domicil of the other party, it is not enough for the validity of the contract that the performance so made has been accepted, then all that is left is an action to recover what has passed. (*Condictio indebiti sine causa* in Roman law.) Most cases, however, will not turn upon this question, but upon whether the party who has already done, or alleges that he has done, his part, shall be satisfied with the *minus*, which is all that the law of the other party allows him."

Other writers attempt to get out of the predicament by applying the law of the party whose performance plays the more important role in the particular class of cases.¹⁹⁴ In the matter of sales the law of the seller has been preferred on that ground.¹⁹⁵ Zitelmann would apply the national law of both parties whenever the fact in question concerns both alike.¹⁹⁶ Others, realizing that all of the above solutions are mere expedients which prove the unfitness of the *lex loci solutionis* with respect to bilateral contracts, abandon it in this class of cases in favor of the *lex loci*.¹⁹⁷

The law of the place of performance is equally unavailable in two other classes of cases. One of these is where an indivisible contract is to be performed in different states.¹⁹⁸ The second class of cases relates to contracts which are to be performed in one of several places at the option of the promisor. The law of the place of performance cannot govern in such a case if the promisor fails to perform in either place.

The *lex loci* also, as has been shown above,¹⁹⁹ is not free from objections. It has been criticized especially with respect to contracts by correspondence, a class of contracts which is very important from the standpoint of the conflict of laws. As a

194. Enneccerus (1898) 4 VERHANDLUNGEN DES 24 DEUTSCHEN JURISTENTAGES, 90; Krohn, *op. cit.*, 94. See also Bar (1902) 19 ANNUAIRE, 142-143.

195. Harburger (1902) 19 ANNUAIRE, 142-143.

196. 2 Zitelmann, *op. cit.*, 411.

197. Neumann, *op. cit.*, 91.

198. Where the contract is divisible, it may be regarded as a separate contract with reference to each state, so that the law of the place of performance could be applied. Minor, *op. cit.*, 380.

199. *Supra* 30 YALE LAW JOURNAL, 663.

matter of legal theory it is without question objectionable to have the rights of parties determined by the law of a particular state simply because the last act to make it a binding contract occurred in that state. If A, a business man in Connecticut, makes an offer to B in New York City, B being a resident of New Jersey, and B forgets to mail the letter of acceptance until he is in New Jersey, it would seem as if the contract should be governed either by the law of New York or by that of Connecticut, but the logical application of the *lex loci* requires in this country that the law of New Jersey govern the rights of the parties. The following substitutes for the *lex loci* have been suggested, among others, in this class of cases: (1) the law of the domicile of the offeror; (2) the law of the place where the offer was made, if such place appeared from the letter or was otherwise known; (3) the law of the party controlling the negotiations; (4) the law of the state which postpones the formation of the contract longest.²⁰⁰

A new method for the solution of the problem before us has been proposed by A. Rolin²⁰¹ and approved by the Institute of International Law at its session in Florence in 1908. Instead of finding the point of contract exclusively either in the personal law of the parties, in the *lex loci contractus*, or in the *lex loci solutionis*, it is derived from the nature of the contract, the relative condition of the parties, and the situs of the property. The conclusions reached by the Institute are embodied in the following resolutions:²⁰²

Art. 1. The effect of contractual obligations is determined by the law to which the parties have manifested their intention to submit themselves, in so far as the validity of the obligation and its effects are not opposed to the laws which control the contract absolutely, particularly as regards personal capacity, formalities, intrinsic validity, or public policy.

Art. 2. If the parties have not expressed a real intention to accept a certain law as a suppletory law, that is to say, as a law intended to fill the gaps in their contracts, to the extent that they are free to determine such effects, the determination of the law to be applied as a suppletory law shall be derived from the nature of the contract, from the relative condition of the parties, or from the situs of the property.

Thus there will be applied:

(a) With respect to contracts made at an exchange, at fairs or at public markets, the law of the place of contracting.

200. *Supra* note 91, at p. 58.

201. (1908) 22 ANNUAIRE, 86-89.

202. *Id.*, 289-292. Art. 2, subdiv. e-h, and i, and Art. 4 have been somewhat condensed.

(b) With respect to contracts affecting immovables, the law of the situs of the immovables.

(c) With respect to gratuitous contracts, the law of the domicile of him who confers the gratuity or renders the gratuitous service (gift, loan without interest, gratuitous agency or bailment, suretyship, etc.).

(d) With respect to commercial sales made between a merchant and a non-merchant, or between a merchant and another merchant, provided it does not constitute a commercial act on the part of the buyer, and excepting the case provided for under (a), the law of the place in which the commercial establishment of the seller is located.

(e) With respect to contracts for service, labor, public works, or supplies for a state, province, county or a public institution, the law of such state, province, etc.

(f) With respect to contracts of insurance, the law of the seat of the company.

(g) With respect to contracts entered into with a person exercising a profession regulated by law (physicians, lawyers, etc.), and which relate to such profession, the law of the place where such profession is exercised.

(h) With respect to contracts of service entered into between laborers or employees and a corporation, partnership, or merchant, the law of the seat of such corporation, partnership, or commercial establishment.

(i) With respect to bills and notes, the law of the place where each contract is entered into, or, if such place be not mentioned in the instrument, that of the domicile of the obligor.

(j) With respect to contracts of carriers, forwarders, etc., the law of the principal establishment.

Art. 3. If the determination of the applicatory law, when the parties are silent, cannot be derived from the nature of the contract, nor from the relative condition of the parties nor from the situs of the property, the judge will take into account the law of their common domicile; in default of a common domicile, their common national law; and if they have neither a common domicile nor a common nationality, the law of the place of contracting.

Art. 4. If the contract has been concluded by correspondence, the *lex loci contractus* shall not be taken into consideration and the law of the domicile of the commercial establishment of the offeror shall be applied.

The same law shall apply where the contract is concluded by telephone. If the question from whom the offer proceeds can not be determined, the law of the common domicile, of common nationality, or subsidiarily, that of the domicile of the debtor shall be applied.

Art. 5. With respect to the mode of execution, counting, weighing and measuring, to default, holidays, and the validity of payment, tender and deposit, the law and the usages of the place of performance shall be applied.

Art. 6. When the effect of the contract depends upon the sense of certain terms used to designate the price, the weight, the measure,

the period and time of payment, reference shall be had in general to the terminology of the place of performance, unless it appears from the circumstances, and especially from the object of the contract, that the parties actually used them in a different sense.

Art. 7. Notwithstanding the above presumptions a manifestation of the real will of the contracting parties, even though it be tacit, shall prevail.

If a uniform law were to be drawn up for the United States, the method followed by the Institute might be found practicable and advantageous. Some of the conclusions reached would require modification in view of the conditions prevailing in this country, but the principle that the subsidiary rule should have reference to the nature of the contract, to the situation of the parties, and to the situs of the property, would appear to be theoretically sound. There is doubt, however, whether a classification of legal transactions along the lines suggested is practicable in a country like ours, where the business organization has assumed to a very large extent an interstate character. However this may be, the method is clearly not a judicial one. It requires a survey of the whole field of contracts and the mode in which the business is conducted, and this cannot be done in a judicial proceeding.

The problem before our courts is therefore the following: Shall one or more *prima facie* presumptions be adopted, which are to be displaced whenever the courts are satisfied that the parties would probably have contracted with reference to another law had they been aware of the question, or shall they adopt one or more subsidiary rules of law which shall control in the absence of evidence showing an *actual* intention of the parties to contract with reference to some other law? The writer is satisfied that the second method is the preferable one. The strongest argument in favor of the first method is that it will correspond more nearly with the presumed intention of the parties. It is submitted, however, that it does not so operate in actual practice. The writer has examined the decisions of the English, French, and German courts and has found that in the great majority of cases when the contract was connected at all with the state in which the court sat, the parties were deemed to have contracted with reference to the law of the forum. In arriving at this conclusion the courts often attributed decisive importance to facts which there is every reason to believe would not have been controlling in the minds of the parties. The uncertainty to which this mode of solving the problem gives rise, preventing the parties as it does from knowing their rights before a judicial determination of the question, makes it ad-

visible that a definite rule be adopted which shall control where the *actual* intention of the parties cannot be ascertained.²⁰³ The nature of such a rule will vary in the nature of things with respect to the different classes of contracts. As regards contracts of affreightment, for example, it might be the law of the flag.²⁰⁴ With respect to ordinary contracts the *lex loci contractus* and the *lex loci solutionis* contend for preference, the advantages and disadvantages of which have been set forth above. The writer is of the opinion that a compromise between the two will afford perhaps the best solution possible of the problem. He would suggest, therefore, that the effects of contracts be determined by the law of the place of performance if a place of performance is specified, and by the law of the place of contracting if a place of performance is not specified.

There is a final question of a general character which requires an answer. It is this: Are all the effects of a contract to be governed by the same law, or may they be subject to different laws? As to the mode of performance, courts and writers are agreed that it is good policy to allow business to be carried on in the usual mode unless the parties have stipulated to the contrary.²⁰⁵ It would be inconvenient if, for example, the details of presentment, protest, and notice had to comply with the local law governing each contract on a bill or note.²⁰⁶ A bank may have thousands of such instruments falling due on the same day, and it would be awkward, to say the least, if the law of the foreign countries in which the instruments were drawn or indorsed had to be satisfied in the above respects. For similar reasons it is held that the mode of delivery, the mode of payment,²⁰⁷ and other similar incidents of performance should be controlled by the law of the place of performance.

Most courts and authors hold also that, when the effect of a contract depends upon the meaning of certain terms used to

203. 3 Catellani, *Il Diritto Internazionale Privato e suoi Recenti Progressi* (1888) 577.

204. *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115.

205. Dicey, *op. cit.*, 563; Foote, *Private International Jurisprudence* (4th ed. 1914) 424; Bard, *op. cit.*, 269; Diena, *Principi* (1910) 245; Meili, *op. cit.*, 525; 2 *id.*, 543; Valery, *op. cit.*, 993; 4 Weiss, *op. cit.*, 389.

206. See Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 150-155.

207. Dicey, *op. cit.*, 566; Foote, *op. cit.*, 425; Asser, *op. cit.*, 74-75; Bard, *op. cit.*, 269; 3 Catellani, *op. cit.*, 568; Despagnet, *op. cit.*, 916-918; Champcommunal (1896) 45 REVUE CRITIQUE, 590; Esperson (1882) 9 CLUNET, 273; Jettel, *Handbuch des Internationalen Privat- und Strafrechts* (1893) 108; Meili, *op. cit.*, (Kuhn's transl. 1905), 326; Pillet (1896) 23 CLUNET, 15; Renault, (1884) 33 REVUE CRITIQUE, 717; Surville et Arthuys, *op. cit.*, 336; 4 Weiss, *op. cit.*, 389. *Contra*: Audinet, *op. cit.*, 301; Dreyfus, *op. cit.*, 370; cf. 2 Rolin, *op. cit.*, 543-544.

designate the weight, the measure, or the period and time of payment, reference should be had to the terminology of the place where the performance is to take place, unless it appears from the circumstances that the parties actually used them in a different sense.²⁰⁸ If a bill of exchange is drawn on Mexico for a sum expressed in dollars, it is convenient to hold that the instrument calls for Mexican dollars.²⁰⁹ If a bill is drawn on a country having still the old calendar, it is reasonable to calculate the day of maturity according to the calendar in use where the instrument is payable.²¹⁰

There is much authority also for the proposition that all matters relating to the performance of a contract, or to the consequences resulting from non-performance, should be governed by the law of the place of performance, irrespective of the law governing the effects of contracts in general. On this point there is, however, much diversity of opinion. The older view was that matters relating to the performance of a contract should be determined by the law of the place of performance. On the continent the names of Bartolus, Foelix, and Fiore are most prominently connected with this view. Induced probably by a desire to reconcile certain passages of the *Corpus Juris Civilis*, some of which were deemed to demand the application of the law of the place of contracting, and others, the law of the place of performance, Bartolus made a distinction between the natural consequences of a contract, i.e., the consequences which arise out of the contract itself, in regard to which the law of the place of contracting would control, and the consequences which arise *ex post facto* from negligence or delay in performance, which would be controlled by the law of the place of performance. If the place of performance was not

208. 2 Rolin, *op. cit.*, 548.

209. Bar, *op. cit.*, 674; Esperson, *Diritto Cambiario Internazionale* (1870) 97; 1 Fiore, *op. cit.*, 223; 1 Massé, *Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Civil* (1844) 546; 2 Rolin, *op. cit.*, 543. *Contra*: Champcommunal (1894) 8 ANNALES DE DROIT COMMERCIAL pt. II. 208; Chrétien, *Principes de Droit International Public* (1893) 153; 4 Lyon-Caen et Renault, *Traité de Droit Commercial* (4th ed. 1906-1914) 262.

210. Bar, *op. cit.*, 675; Esperson, *op. cit.*, 89; 2 Grünhut, *Wechselrecht* (1897) 585; 4 Lyon-Caen et Renault, *op. cit.*, 563; 1 Massé, *op. cit.*, 570-571; Nouguiér, *Les Lettres de Change* (4th ed. 1875) no. 1428; 4 Weiss, *op. cit.*, 465-466; cf. 3 Diena, *Trattato di Diritto Commerciale Internazionale* (1905) 144-146; Ottolenghi, *La Cambiale del Diritto Internazionale* (1902) 265-266. *Contra*: Audinet, *op. cit.*, 614; Bettelheim, *Das Internationale Wechselrecht Oesterreichs* (1904) 167; Champcommunal, (1894) 8 ANNALES DE DROIT COMMERCIAL, pt. II, 201; Chrétien, *op. cit.*, 142; Despagnet, *op. cit.*, 994; 2 Jetta, *La Substance des Obligations dans le Droit International Privé* (1907) 81, 111; Surville et Arthuys, *op. cit.*, 725.

specified in the contract, Bartolus applied the law of the forum, which he regarded as the place where such negligence or delay occurred.²¹¹

Foelix maintains that the law of the place of contracting should determine the "effects" of a contract, while the "consequences" thereof should be governed by the law of the place of performance. The "effects" of a contract, according to Foelix, arise from the very nature of a contract and are the rights, duties, etc., which the parties positively intended to create. The "consequences" of a contract, on the other hand, are, according to this writer, the rights, duties, etc., which the legislator created in connection with the performance of the contract. They do not inhere in the contract, but result from events arising subsequent to its formation.²¹² Foelix included among the "consequences" the mode of performance, the effect of negligence, what constitutes default or non-performance, the amount of damages resulting from such default or non-performance, and the ratification of voidable contracts.²¹³ He holds that an action for rescission by the seller for non-payment of the price results from the contract itself, and is governed, therefore, by the *lex loci*,²¹⁴ while an express stipulation that the contract shall be *ipso facto* terminated upon non-payment of the purchase price relates to the consequences of the contract and is governed, therefore, by the law of the place of performance.²¹⁵

Fiore makes a distinction between the *vinculum juris* of a contract (*id quod actum est*), by which he means its intrinsic validity, substance and extent of the obligation, which should be subject, in his opinion, in the absence of a common nationality, to the law of the place of contracting, and the *onus conventionis* (*id quod in obligatione est*), by which he means the performance or mode of performance of the contract, which he determines with reference to the law of the place of performance.²¹⁶ The question whether the defendant is responsible in case of *culpa* or *dolus*, accident or *vis major*, or whether the plaintiff is entitled to specific performance or to damages concerns, according to Fiore, the *id quod actum est*.²¹⁷ On the other hand, the question whether fault, negligence, accident, or default exists,²¹⁸ or whether in the case of a sale the seller or the

211. Bartolus, *Conflict of Laws* (Beale's transl. 1914) 18-20.

212. 1 Foelix, *op. cit.*, 248-249.

213. *Id.*, 254-255.

214. *Id.* 250.

215. *Id.* 258.

216. 1 Fiore, *op. cit.*, 184-186; *Elementi di Diritto Internazionale Privato* (1905) 355; 20 *ANNUAIRE*, 175-177.

217. 1 Fiore, *Le Droit International Privé*, 186; *Elementi*, 385.

218. 1 Fiore, *Droit Int.*, 187; *Elementi*, 355.

buyer has to bear the expense incident to delivery,²¹⁹ concerns the *id quod in obligatione est* and is subject, therefore, to the laws of the place of performance.

Ever since Lord Mansfield's dictum in *Robinson v. Bland*,²²⁰ the English and American courts have been inclined to determine the effects of contracts by the law of the place of performance, so that the problem now discussed has not been clearly before the courts.²²¹ There are dicta, however, that matters relating to performance are subject to the law of the place of performance without reference to the law governing the effects of contracts in general. The Supreme Court of the United States gave expression to this view in a celebrated dictum in the case of *Scudder v. Union National Bank of Chicago*, in which it said:²²²

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance."

Professor Beale accepts this statement with the modification that the effect of contracts is to be governed by the law of the state where the effect is to take place.²²³ In support of the statement regarding the effect of contracts, he relies upon the cases of *Greenwald & Co. v. Kaster*,²²⁴ *Waverly Nat'l Bank v. Hall*,²²⁵ *Abt v. Bank*,²²⁶ and *Hamlin v. Talisker Distillery Co.*²²⁷ These cases, it is submitted, do not bear out the proposition in support of which they are cited.

In the case of *Greenwald v. Kaster*, Eckhouse and Kaster contracted a debt as partners in Pennsylvania. Suit was brought for the recovery of the debt in Pennsylvania, and judgment was taken against Kaster. Plaintiff subsequently released Eckhouse on the debt in Indiana. All the case held was that the effect of the release of Eckhouse on Kaster's liability should be determined by the law of the state in which the original debt was incurred, and the judgment was obtained.

219. (1904) 20 ANNUAIRE, 176-177.

220. (1760, K. B.) 2 Burr. 1081.

221. "The place at which each party to a bill or note undertakes that he himself will pay it, is with regard to him the *lex loci contractus*, according to which his liability is governed," Mayne, *Damages* (9th ed. 1920) 275.

222. (1875) 91 U. S. 406, 412.

223. 3 Beale, *Cases on the Conflict of Laws* (1907) 543.

224. (1878) 86 Pa. 45.

225. (1892) 150 Pa. 466, 24 Atl. 665.

226. (1896) 159 Ill. 467, 42 N. E. 856.

227. [1894, H. L.] A. C. 202.

In the case of *Waverly National Bank v. Hall*, a loan of money had been made to a person about to embark in business, in consideration of a share of the profits. The loan was made in Pennsylvania, but the business was to be conducted in New York, and the question was whether there was, under the contract, a liability as partners with respect to third parties. The court held that the question was governed by the law of New York. This conclusion was reached by adopting Story's view that the law of the place of performance controls the validity, nature, obligation and interpretation of contracts whenever such law differs from the law of the place of contracting. By way of caution, however, the learned court added:²²⁸ "All agree that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance." There is nothing in the opinion of the court suggesting that the effect of a contract is to be governed by a special law. In *Abt v. Bank* the court held that the question whether the drawing of a draft would operate as an assignment *pro tanto* of the drawer's funds in the hands of the bank was controlled by the law of the state in which the bank was located. Of the cases cited by Professor Beale, this is the only one which might be regarded as lending color to his statement that the effect of contracts is to be controlled by the law of the place where such effect occurs. But it is manifest that the case decides only a special problem arising in the law of bills of exchange, and that it does not determine anything concerning the effect of contracts in general. In the English case of *Hamlyn & Co. v. Talisker Distillery* a contract had been entered into in England which was performed in Scotland. The contract provided that any dispute arising out of it should be settled by two members of the London Corn Exchange. In the instant case the House of Lords thought "that the language of the arbitration clause indicated very clearly that the parties intended that the rights under that clause should be determined according to the law of England," and concluded accordingly that the clause was valid and would oust the jurisdiction of the Scotch courts. This case shows merely that where parts of a contract are to be performed in different countries the performance of the different parts may be subject to different laws.

The notion that all matters connected with the performance of a contract should be subject to the law of the place of performance without reference to the law governing the contract as such and the rights and duties arising therefrom appears to be very plausible at first sight, and so far as the mode of per-

formance is concerned, the *lex loci solutionis* should control for obvious reasons of convenience. As to matters connected with the performance of a contract in other respects, the question becomes, however, upon closer examination, more difficult. Many able minds have addressed themselves to the solution of the problem, on the continent, but they have found it impossible to draw a clear line of division between the rights and duties arising from the formation of the contract as such, and those connected with its performance. The illustrations given above from Foelix and Fiore show the disagreement between these two authors. If their conclusions were examined in greater detail and compared with those of the other writers subscribing to this doctrine, we would be forced to agree with Laurent that "the distinction is so subtle as to be almost incomprehensible."²²⁹ The vast majority of modern writers have reached the conclusion that no distinction can be made on principle between the direct and indirect consequences, or the effects resulting from the contract on the one hand and those resulting from non-performance on the other.²³⁰ A. Rolin voices their opinion when he says in substance:

"The above distinction has been overthrown by modern science as too vague and too difficult of application."²³¹

The contention has been made that there is a fundamental difference between the primary rights and duties arising from a contract and the secondary duties arising from its breach. In the case of *Healy v. Gorman*,²³² in which the question related to the law governing the rate of interest upon non-payment of a note which had been executed in New York and was payable in New Jersey, the learned court used the following language:²³³

"The contract did not carry interest upon the face of it, but upon default of payment at the day and place, the law of this state tacitly annexes an obligation thenceforth to pay interest until the debt is liquidated. . . . The contract itself was for payment at a day cer-

229. 7 Laurent, *op. cit.*, 552.

230. Aubry (1896) 23 CLUNET, 731 ff.; Audinet, *op. cit.*, 292; Bossion, *op. cit.*, 244 ff.; Chausse (1886) 35 REVUE CRITIQUE, 693-694; 2 Conde y Luque, *Derecho Internacional Privado* (1907) 311 ff.; Despagnet, *op. cit.*, 897 ff.; Dreyfus, *op. cit.*, 367; Gabba (1908) 22 ANNUAIRE, 264; Gestoso y Acosta, *Curso Elemental de Derecho Internacional Privado* (1900) 477; 7 Laurent, *op. cit.*, 552; Harburger (1902) 19 ANNUAIRE, 137; Pillet, *Cours*, 331; *Principes*, 440-441; 1 Rolin, *op. cit.*, 524 ff.; Surville et Arthuys, *op. cit.*, 301, 315 ff.

231. (1908) 22 ANNUAIRE, 83.

232. (1836) 15 N. J. L. 328.

233. *Id.*, 329.

tain. It did not contemplate a failure in the performance, and therefore made no provisions in anticipation of such an event; but left the law to take its course in case of a breach of the contract. Since, therefore, the event which gave rise to and legalizes the plaintiff's claim to interest, happened in this state; or in other words, since it was *here* that the right to interest accrued, and by operation of *our* law that it becomes payable, the rate of interest must be such as is allowed in this state."

The same argument is advanced to show that the measure of damages should be controlled by the law of the state in which the defendant agreed to perform.²³⁴ This line of reasoning rests upon the so-called territorial theory. In substance it amounts to this—the failure to perform having occurred in the above case in the state of New Jersey, the law of that state has an exclusive power to define the consequences that should attach to the breach of the contract. If the defendant had been in New Jersey at the maturity of the note, and had declined to pay, the territorial power of the state of New Jersey could, of course, in accordance with the traditional Anglo-American theory, impose upon the defendant the duty to pay damages for non-payment. Again, if the defendant had been a citizen of New Jersey, the personal relationship between him and the state might, consistently with Anglo-American views, suffice to confer upon the state of New Jersey the power to impose upon the defendant the duty to pay interest by way of damages. It did not appear in the case, however, that the defendant was in the state of New Jersey at the time of the maturity of the note, or at any other time or that he was a citizen of the state. The learned court does not inquire into these facts, but considers the circumstance that the note was payable in New Jersey as an event happening in New Jersey which gave rise to the plaintiff's claim to interest. Applying Story's definition of the territorial theory in its broadest possible form, it is difficult to see how it can be stretched to include an "event" such as the above, i.e. a mere failure to pay a note which the defendant had executed in another state. The reasoning of the court in *Healy v. Gorman*, above quoted, is another illustration tending to show that the so-called territorial theory, instead of solving

234. Professor Beale commenting upon the decision of *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 558, says: ". . . The court intimated that where they are different the measure of damages, like the obligation of the contract itself, is determined by the law of the place of making. This notion seems to lose sight of the fact that the right to damages forms no part of the original obligation, and is created, not by the contract, but by the law upon breach of the contract." 4 Sedgwick, *Damages* (9th ed. 1912) 2759, note.

problems in the conflict of laws, leads only to muddled thinking on the subject.

In reality the question is whether the law of the forum on grounds of policy should incorporate the rate of interest or the measure of damages governing in the state in which the defendant agreed to pay or to perform, or in which the breach actually occurred, or whether these matters should be determined by the law governing the contract in general. Which rule should the forum prescribe when the parties are silent on the subject? In favor of the application of the law of the place of performance or of the place in which the breach occurred it has been argued that, in as much as the rule governing contracts in general rests upon the probable intention of the parties, it is inapplicable to the consequences resulting from non-performance, because the parties cannot be deemed to have contracted with reference to its breach.²³⁵ The great majority of the courts and writers²³⁶ in recent years agree, however, with Laurent when he says: "One cannot think of performance without thinking at the same time of non-performance."²³⁷ So far as the parties think about the legal consequences of their contract Laurent's statement is no doubt correct. Actually the parties rarely think about legal consequences of their acts. If the consequences resulting from the execution of a contract are controlled on grounds of policy by the law governing the contract, although they were not present to the minds of the parties, similar considerations of policy may suggest that the consequences resulting from non-performance should be governed by the same law. It is possible, on the other hand, that, with regard to the latter, other considerations of policy may require the application of the law of the place of performance. The writer believes that such considerations exist in the matter of moratory interest. Most countries have adopted a legal rate of interest as the measure of damages for the payment of money, representing the average value of money in such country. As the value of the money at the place where it was agreed to be paid represents, in the normal case, plaintiff's loss, the legal rate prevailing at that place should control.²³⁸ The same argument does not apply, however, to the measure of damages for the breach of contracts other than those calling for the pay-

235. 1 Foelix, *op. cit.*, 252; 1 Fiore, *op. cit.*, 186.

236. Audinet, *op. cit.*, 292; Bossion, *op. cit.*, 261; Chausse (1886) 35 REVUE CRITIQUE, 693-694; Despagnet, *op. cit.*, 899; Dreyfus, *op. cit.*, 369, 370; Jettel, *op. cit.*, 108; Pillet, *Cours*, 331; *Principes*, 440-441; 1 Rolin, *op. cit.*, 524, 527.

237. 7 Laurent, *op. cit.*, 556-557.

238. Lorenzen, *op. cit.*, *supra*, note 15, at p. 172; 3 Fiore, *op. cit.*, 258.

ment of money. The rules of damages of the different countries arise from considerations of a purely juridical order, and do not represent differences in the economic value of plaintiff's contract in those countries. From the standpoint of justice there is no apparent reason, therefore, why a contract that is governed in general respects by the law of the place of contracting should be subject as regards the measure of damages to the law of the place of performance.²³⁹

The rules that should govern the effects of contracts may be summarized as follows:

- (1) The effects of contracts are governed by the law of any state chosen by the parties.
- (2) If the intention of the parties is not expressed, the effects of contracts shall be governed by the law of the specified place of performance.
- (3) If the intention of the parties does not appear and no place of performance is specified the law of the place of contracting shall control.
- (4) The law so governing determines not only the primary rights and duties arising from the contract but also the secondary rights arising from its breach.

However, the legal rate of interest for the non-payment of money shall be determined by the law of the place of payment.

- (5) The mode of performance is governed by the law and usages of the place of performance.
- (6) Where the effect of a contract depends upon the meaning of certain terms designating the price, weight, or measure, or the time of performance, reference shall be had to the terminology of the place of performance, unless it appears from the circumstances that the parties used them in a different sense.

239. Asser, *op. cit.*, 81; Audinet, *op. cit.*, 292; Baudry-Lacantinerie & Barde, *Traité Théorique et Pratique de Droit Civil*, tit. *Obligations* (1905) no. 497; Chausse (1886) 35 *REVUE CRITIQUE*, 693-694; 2 Conde y Luque, *op. cit.*, 313; Despagnet, *op. cit.*, 912; 3 Diena, *Trattato*, 209; 7 Laurent, *op. cit.*, 556; Ottolenghi, *op. cit.*, 469; Pillet, *Cours*, 331; 1 Rolin, *op. cit.*, 527-528; Surville & Arthuys, *op. cit.*, 738-739. But compare 3 Lyon-Caen et Renault, *op. cit.*, no. 35.

11. THE STATUTE OF FRAUDS AND THE CONFLICT OF LAWS*

I

A STUDY of the American decisions relating to the statute of frauds from the standpoint of the Conflict of Laws reveals the fact that there exists the greatest divergence of opinion with respect to contracts falling within the fourth and seventeenth sections of the original English statute of frauds. It is the purpose of this article to consider the problems that have been raised in connection with these cases, and to suggest a solution. Of the contracts falling within the fourth section of the statute of frauds those presented to the courts involving the Conflict of Laws have been generally contracts not to be performed within a year, contracts of guaranty, and contracts relating to land.

English Law. The leading case on the subject, *Leroux v. Brown*,¹ laid down the English law with respect to cases falling within the fourth section of the statute of frauds. An oral agreement had been entered into at Calais, France, between the plaintiff and the defendant under which the latter, who resided in England, contracted to employ the former, who was a British subject resident at Calais, at a salary of 100 pounds per annum, to collect poultry and eggs in that neighborhood for transmission to the defendant in England, the employment to commence at a future day, and to continue for one year. In a suit for breach of contract evidence was given on the part of the plaintiff to show that by the law of France such an agreement was capable of being enforced, although not in writing. For the defendant it was insisted that notwithstanding the contract was made in France, when it was sought to enforce it in England, it must be dealt with according to English law, and, being a contract not to be performed within a year, section 4 of the statute of frauds required it to be in writing. The judges of the Common Pleas Court unanimously held that the defendant's contention was sound and that a nonsuit should be entered. This conclusion was based upon the particular wording of the fourth section ("no action shall be brought") and the decisions of the courts which had held that a writing subsequent to the agreement and addressed to a third person was a sufficient memorandum

* (1923) 32 YALE LAW JOURNAL 311.

1. (1852) 12 C. B. 801.

of the agreement, showing that the above section involved "procedure" and not "the right and validity of the contract itself." The cases of *Carrington v. Roots*² and *Reade v. Lamb*,³ which had considered all contracts falling either within the fourth or the seventeenth section of the statute of frauds as void, were overruled. In his opinion Jervis, C. J., said:⁴

"I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made: but not in England. Looking at the words of the 4th section of the Statute of Frauds, and contrasting them with those of the 1st, 3d, and 17th sections, this conclusion seems to me to be inevitable. The words of section 4 are, 'no action shall be brought upon any agreement which is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized.' The statute, in this part of it, does not say, that, unless those requisites are complied with, *the contract shall be void*, but merely that *no action shall be brought upon it* and, as was put with great force by Mr. Honyman, the alternative, 'unless the agreement, or some memorandum or note thereof, shall be in writing,'—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement may be good, though not capable of being enforced if not evidenced in writing. This therefore may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice."

Referring to the difference in the wording between the fourth and the seventeenth sections, Maule, J., said:⁵

"But we have been pressed with cases which it is said have decided that the words 'no action shall be brought' in the 4th section, are equivalent to the words 'no contract shall be allowed to be good,' which are found in another part of the statute. . . . It may be, that, for some purposes, the words used in the 4th and 17th sections may be equivalent; but they are clearly not so in the case now before us; for, there is nothing to prevent this contract from being enforced in a French court of law. Dealing with the words of the 4th section as we are bound to deal with all words that are plain and unambiguous, all we say, is, that they prohibit the Courts of this country from enforcing a contract made under circumstances like the present,—just

2. (1837, Exch.) 2 M. & W. 248.

3. (1851) 6 Exch. 130.

4. (1852) 12 C. B. 801, 824.

5. *Ibid.* 826–827.

as we hold a contract incapable of being enforced, where it appears upon the record to have been made more than six years. It is parcel of the procedure, and not of the formality of the contract."

Accordingly, because of its special phraseology, the 4th section was deemed not to enter at all into the validity of the contract, not even into its form, but to render it merely unenforceable.

Story's view that "all the formalities, proofs, or authentications of them which are required by the *lex loci*, are indispensable to their validity everywhere else"⁶ was called to the attention of the court, but was not accepted.

The suggested distinction between the fourth and seventeenth sections, because of the difference in their wording, was never fully adopted by the English courts. The prevailing view has been that such difference was unintentional, both sections relating only to the enforceability of the contract.⁷ In accordance with this view the English Sale of Goods Act has changed the former wording of the seventeenth section to bring it into conformity with the fourth section.⁸ It now provides that a sale of goods not complying with the terms of the statute "shall not be enforceable by action."

The English law on the subject is therefore one of extreme simplicity. So far as a contract falls within the fourth or the seventeenth section of the English statute of frauds, it is unenforceable in England, if the requisites of the English statute have not been met, irrespective of the requirements of the law of the place of contracting, of the law of the place of performance, or, if the contract relates to land, of the situs of the property.

6. Story, *Conflict of Laws* (1st ed. 1834) sec. 262. After the decision in *Leroux v. Brown* a note was added in which the result of the English case was accepted. Story, *Conflict of Laws* (8th ed. 1883) sec. 576, note a.

7. *Bailey v. Sweeting* (1861) 9 C. B. (N. S.) 843; *Stevewright v. Archibald* (1851) 17 Q. B. 103; Brett, L. J., in *Britain v. Rossiter* (1879, C. A.) L. R. 11 Q. B. Div. 123; Lord Blackburn, in *Maddison v. Alderson* (1883, H. L.) L. R. 8 A. C. 467; Viscount Haldane, in *Morris v. Baron* [1918, H. L.] A. C. 1, 15. See, however, Lord Finlay to the contrary. *Ibid.* 11. The same construction has been placed upon the seventh section of the statute of frauds. *Rochevoucauld v. Boustead* [1897, C. A.] 1 Ch. 196.

Dissenting voices have not been lacking, however. "I am not satisfied that either of the sections of the statute of frauds to which reference has been made warrants the decision [of *Leroux v. Brown*]." Willes, J., in *Williams v. Wheeler* (1860) 8 C. B. (N. S.) 299.

8. "Sec. 4 of the Sales of Goods Act," says Viscount Haldane, "relates to evidence and procedure, and not to substantive validity." *Morris v. Baron*, *supra* note 7, at p. 15. Lord Finlay was of the opinion that the distinction referred to in the text had become established in English law and concluded therefore that the Sale of Goods Act altered the law. *Ibid.* 11.

American Law. Contrary to the English law, the law of the United States is in an unsettled condition. This situation results in the first place from the variations in the wording of the two sections of the statute of frauds under consideration. While the wording of the fourth section of the original English statute has been followed by the majority of states, there are many in which it has been modified. Instead of providing that "no action shall be brought" it is frequently said that the contract shall be "invalid"⁹ or "void."¹⁰ Sometimes the statute reads that the contract shall not be "binding."¹¹ By providing that "no evidence . . . is competent, unless it be in writing," the Iowa Statute¹² makes it clear that the statute of frauds is intended to lay down a mere rule of evidence.

The wording of the seventeenth section of the original English statute of frauds providing that such contracts "shall not be allowed to be good" was retained in a number of states.¹³ In many states such a contract was declared to be "invalid"¹⁴ or "void,"¹⁵ or not "binding."¹⁶ In Iowa, on the other hand, it

9. Calif. Civ. Code, 1915, sec. 1624; Idaho, Comp. Sts. 1919, sec. 7976; Mont. Rev. Code, 1921, sec. 7519; N. D. Comp. Laws, 1913, sec. 5888; Okla. Comp. Laws, 1909, sec. 1089; S. D. Rev. Code, 1919, sec. 855-856. The section of the Idaho statute adds the following: "Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents."

10. Ala. Code, 1907, sec. 4289; Colo. Rev. Sts. 1908, secs. 2662, 2666; Mich. Comp. Laws, 1915, sec. 11981; Minn. Gen. Sts. 1913, sec. 7003 (contracts relating to land); Neb. Comp. Sts. 1922, sec. 2458; Nev. Rev. Laws, 1912, sec. 1075; N. Y. Cons. Laws, 1909, ch. 41, sec. 31; N. C. Cons. Sts. 1919, sec. 988 (contracts relating to land); Or. Rev. Laws, 1920, sec. 808; Utah, Comp. Laws, 1917, sec. 5817; Wash. Codes & Sts. 1910, sec. 5289; Wis. Sts. 1921, secs. 2304, 2307; Wyo. Comp. Sts. 1920, secs. 4719, 4726.

Or. Rev. Laws, 1920, sec. 808, adds that "evidence therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents."

11. Ark. Dig. of Sts. 1921, sec. 4862. In Georgia the agreement is not "binding on the promisor." Code, 1911, sec. 3222.

12. Ann. Code, 1897, sec. 4625.

13. Conn. Gen. Sts. 1902, sec. 1090; Fla. Rev. Gen. Sts. 1920, sec. 3873; Hawaii, Rev. Laws, 1915, sec. 2662; Mass. Rev. Laws, 1902, ch. 74, sec. 5; Hemingway's Ann. Miss. Code, 1917, sec. 3123; Mo. Rev. Sts. 1919, sec. 2170; S. C. Laws, 1912, sec. 3738.

14. Calif. Civ. Code, 1915, secs. 1739, 1624 (4); Idaho, Comp. Sts. 1919, sec. 7976 (4); Burns' Ann. Ind. Rev. Sts. 1914, sec. 7469; Me. Rev. Sts. 1916, ch. 114, sec. 5; Mich. Comp. Laws, 1915, sec. 11835; Mont. Rev. Code, 1921, sec. 7519 (4), 7591; N. H. Pub. Sts. 1901, ch. 215, sec. 3; N. D. Comp. Laws, 1913, sec. 5888; Okla. Comp. Laws, 1909, sec. 1089 (4); S. D. Rev. Code, 1919, sec. 857; Vt. Gen. Laws, 1917, sec. 1877.

15. Colo. Rev. Sts. 1908, sec. 2666 (4); Minn. Gen. Sts. 1913, sec. 6999; Neb. Comp. Sts. 1907, sec. 6028; Nev. Rev. Laws, 1912, sec. 1076; N. J. Comp. Sts. 1911, p. 2615, sec. 6; N. Y. Cons. Laws, 1909, ch. 41, sec. 31;

was provided again that "no evidence is competent unless it be in writing."¹⁷

Many of the above states have adopted in recent years the Uniform Sales Act, which has accepted the wording of the English Sale of Goods Act, so that the contract is now "not enforceable by action," if the requisites of the statute are not met.¹⁸

The different holdings by the American courts with respect to the statute of frauds from the standpoint of the Conflict of Laws cannot be accounted for, however, solely by the above differences in the wording of the statutes. Even where the wording of the statute was identical with that of the English statute not infrequently a different conclusion has been reached from that of *Leroux v. Brown*, the English doctrine not being deemed sound on principle nor in harmony with the requirements of business. The cases on the subject may be roughly classified as follows:

(1) Some courts have been inclined to adopt the distinction suggested by *Leroux v. Brown*,¹⁹ according to which, if the statute of the forum provides that "no action shall be brought" or words of similar import, it is deemed to affect "procedure." In such jurisdictions no contract not complying with the terms of the statute can be enforced, even though such contract is valid and enforceable under the law of the place of contracting, the law of the place of performance, and of the situs of the property. On the other hand, if the contract is declared to be

Or. Laws, 1920, sec. 808(5); Utah, Rev. Sts. 1898, sec. 2469; Wis. Sts. 1921, sec. 2308; Wyo. Comp. Sts. 1910, sec. 3752.

16. Ark. Dig. of Sts. 1921, sec. 4864. The Georgia statute provides that it shall not be "binding on the promisor" [Code, 1911, sec. 3222(7)] and the Washington statute provides that the contract shall not "be good and valid" (Codes & Sts. 1910, sec. 5290).

17. Ann. Code, 1897, sec. 4625.

18. Alaska, Laws, 1913, ch. 66, sec. 4; Ariz. Rev. Sts. 1913, sec. 5152, Conn. Gen. Sts. 1918, sec. 6131; Idaho, Laws, 1919, ch. 149, sec. 4; Smith's Ill. Rev. Sts. 1921, ch. 121½, sec. 4; Iowa, Laws, 1919, ch. 396, sec. 4; Md. Ann. Code 1911, art. 83, sec. 25; Mass. Gen. Laws, 1921, ch. 106, sec. 6; Mich. Comp. Laws, 1915, sec. 11835; Minn. Gen. Sts. Supp. 1917, sec. 6015(4); Neb. Comp. Sts. 1922, sec. 2473; Nev. Rev. Laws, 1919, p. 3034, sec. 4; N. J. Comp. Sts. 1910, p. 4648, sec. 4; N. Y. Cons. Laws, 1909, ch. 41, sec. 85 amended by Laws, 1911, ch. 571; N. D. Laws, 1917, ch. 202, sec. 4; Ohio, Gen. Code, 1921, sec. 8384; Pa. Sts. 1920, sec. 19652; R. I. Gen. Laws, 1909, p. 911, sec. 4; S. D. Laws, 1921, ch. 355, sec. 4; Tenn. Laws, 1919, ch. 118, sec. 4; Utah, Comp. Laws, 1917, sec. 5113; Vt. Laws, 1921, No. 171, sec. 4; Wis. Sts. 1921, sec. 1684t(4) (the old wording is still found in sec. 2308); Wyo. Comp. Sts. 1920, sec. 4726.

19. *Third Nat. Bk. v. Steel* (1912) 129 Mich. 434, 88 N. W. 1050 (representations as to credit of another); *Kleeman & Co. v. Collins* (1872, Ky.) 9 Bush. 460 (contract not to be performed in a year).

"invalid" or "void," it is deemed to affect the "substance" of the contract. Under such a statute the contract is not controlled by the internal law of the forum, but by the law of the place of contracting, the law of the place of performance, or the law of the situs of the property, as the case may be. Contracts for the sale of goods were accordingly held by most courts to be controlled in the matter of the statute of frauds by the *lex loci contractus*.²⁰ In view of the change in the language of the seventeenth section, introduced by the Uniform Sales Act, the courts belonging to this group and sitting in states in which the Act has been adopted, may feel compelled, on the ground of consistency, to hold that the section in its new form affects procedure only.

(2) Another group of cases holds that the difference in the wording of the fourth and seventeenth sections of the statute of frauds is purely accidental and does not justify therefore a difference in the operative effect of the sections. There is no agreement, however, as to whether the statute affects "substance" or "procedure." Some courts agree with the English courts and hold that both sections concern only the "enforceability" of the contract, or "procedure," or prescribe the "evidence" by which the agreement must be proved.²¹ Others, declining to accept the English view, have reached the conclusion that both sections of the statute of frauds affect the "substance" of the contract, which is controlled therefore also in this regard, from the standpoint of the Conflict of Laws, by the law governing its substantive requirements in general.²²

20. *Hunt v. Jones* (1879) 12 R. I. 265; *Perry v. Mt. Hope Iron Co.* (1886) 15 R. I. 380, 5 Atl. 632; *Houghtaling v. Ball* (1853) 19 Mo. 84, (1855) 20 Mo. 563; *Jones v. Nat. Cotton Oil Co.* (1903) 31 Tex. Civ. App. 420, 72 S. W. 248; *Brockman Commission Co. v. Kilbourne* (1905) 111 Mo. App. 542, 86 S. W. 275; *D. Canale & Co. v. Pauly* (1914) 155 Wis. 541, 145 N. W. 372; *Franklin Sugar Refining Co. v. Holstein Harvey's Sons, Inc.* (1921, D. Del.) 275 Fed. 622.

21. *Townsend v. Hargreaves* (1875) 118 Mass. 325 (contract for sale of goods); *Bird v. Monroe* (1877) 66 Me. 337 (contract for sale of goods).

22. *Cochran v. Ward* (1892) 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581 (parol lease); *Miller v. Wilson* (1893) 146 Ill. 523, 34 N. E. 1111 (contract for sale of land); *Halloran v. Jacob Schmidt Brewing Co.* (1917) 137 Minn. 141, 162 N. W. 1082 (contract of guaranty); *Matson v. Bauman* (1918) 139 Minn. 296, 166 N. W. 343 (agreement to repurchase stock).

Judge Holt, in *Halloran v. Jacob Schmidt Brewing Co.*, *supra* note 22, said: "We believe no distinction should be made between the two sections because of the use of the language 'no action shall be maintained' in the one, and 'every contract shall be void' in the other; but that the phrases, in the connection in which they are used, mean one and the same thing, namely, to make a valid contract in this state, concerning subjects mentioned in said sections, a writing is required." 137 Minn. at p. 146, 162 N. W. at p. 1084.

One of the leading cases supporting the latter view is *Cochran v. Ward*, in which suit was brought in Indiana for the breach of a parol lease of lands in the State of Illinois, the contract having been entered into in the latter state. The Illinois statute of frauds provided that "no action shall be brought to charge any person upon any contract for the sale of lands . . . , or any interest in or concerning them for a longer term than one year, unless such contract, or some memorandum or note thereof, shall be in writing. . . ." In answer to the argument that the statute of frauds related to "procedure" and was controlled by the internal law of the forum, the learned court said:²³

"It is impossible to consider a contract separately from the remedy given by the law for its enforcement, because it is this that supplies it with legal vitality. The law is an essential factor in every contract, and is presumed to be considered by the parties in their deliberations. If the law of the place stamps upon an agreement the quality that it shall be voidable, and that its performance shall be a pure matter of conscience or grace with the parties, that quality becomes a part of the substance of the agreement, and characterizes it wherever it may be. A right without a remedy for its enforcement is a mere fiction. Thus it was said by Swayne, J., for the court in *Edwards v. Kearzey* (1877) 96 U. S. 595, 'it is also the settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement.'

"At another place in the opinion the learned judge said: 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than its means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.'"

"There can be no doubt, we think, that to the extent that the remedy affects the validity and obligation of a contract it is imported into and becomes an essential part of it, and characterizes it wherever it is the subject-matter of litigation.

"The Illinois statute of frauds became part of the agreement in suit and the provision that no action should be maintained for damages for the breach of the agreement became as much a part of its character and substance as if specifically incorporated therein. The right to defend against a contract growing out of any of its inherent qualities, becomes vested, and a right of property as much as the right to enforce any other beneficial provision. *Pritchard v. Norton*

(1882) 106 U. S. 124, 1 Sup. Ct. 102; Cooley, *Constitutional Limitations*, 362, 369.

"This doctrine does not conflict with the general rule that in matters of procedure the *lex fori* controls. 'Procedure,' in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial and the nature and effect of process, and perhaps to all other matters or remedy only, which are not incorporated into the contract as affecting its nature and obligatory character."²⁴

(3) There is another group of cases in which the fourth or the seventeenth section of the statute of frauds was passed upon without any expression of opinion regarding the other section.²⁵

24. In the above case the law of the place of contracting and that of the situs coincided. Where they differ, the law is uncertain. There are a number of earlier cases which appear to sustain the application of the law of the situs. See *Davenport v. Karnes* (1873) 70 Ill. 467 (parol antenuptial contract); *Abell v. Douglas* (1847, N. Y.) 4 Denio, 305 (parol transfer of equitable interest); *Burrell v. Root* (1869) 40 N. Y. 496 (contract of sale); *Siegel v. Robinson* (1867) 56 Pa. 19 (contract of sale); *Bissell v. Terry* (1873) 69 Ill. 184 (authorization of agent to sell land); *Marie v. Garrison* (1883, N. Y. Super. Ct.) 13 Abb. New. Cas. 210; *Anderson v. May* (1872, Tenn.) 10 Heisk. 84 (oral lease for a longer term than one year). The cases were decided, however, before *Polson v. Stewart* (1897) 167 Mass. 211, 45 N. E. 737.

The question was raised in the more recent case of *Meylink v. Rhea* (1904) 123 Iowa, 310, 98 N. W. 779 (contract for sale of Iowa land); and the view was there expressed that the law of the situs governs. The statement was not necessary for the decision, however, because the law of the situs and the *lex fori* coincided, and the evidence theory of the statute of frauds has been adopted by statute in Iowa. See also *Wilson v. Lewiston Mill Co.* (1896) 150 N. Y. 314, 44 N. E. 959.

As regards contracts not to be performed within a year and contracts of guaranty, a similar uncertainty exists as to whether the law of the place of contracting is applicable or that of the place of performance. No satisfactory cases in point have been found. *Turnow v. Hochstadter* (1876, N. Y. Sup. Ct.) 7 Hun. 80, and *Garnes v. Frazier* (1909, Ky.) 118 S. W. 998, would apply the law of the place of performance with respect to contracts not to be performed within a year, but that law coincided again with the *lex fori*. *Ringgold v. Newkirk* (1840) 3 Ark. 96, stated that the *lex loci* governed contracts of guaranty, but the statement was made merely by way of contrast with the *lex fori*. The contract was performable in the place of contracting.

25. To the effect that the fourth section affects procedure or evidence see, in addition to cases mentioned in notes 19 and 21, *Heaton v. Eldridge* (1897) 56 Ohio St. 87, 46 N. E. 638 (agreement not to be performed within a year); *Buhl v. Stephens* (1898 C. C. Ind.) 84 Fed. 922; *Boone v. Coe* (1913) 153 Ky. 233, 154 S. W. 900 (contract for lease of land); *Downer v. Chesebrough* (1869) 36 Conn. 39.

To the effect that the fourth section affects the substance of the contract see, in addition to cases falling within this section, mentioned in note 22, *Fox v. Matthews* (1857) 33 Miss. 433 (contract for sale of slave); *Abell*

(4) According to another view the statute of frauds is regarded as being based on moral grounds and as laying down a rule of public policy in the face of which a foreign contract, though valid and enforceable where made, cannot be enforced.²⁶

The federal courts deem themselves bound by the construction placed upon the statute by the Supreme Court of the state.²⁷

Continental Law. Statutes analogous to the English statute of frauds exist in certain continental countries, notably in those of the Code Napoléon. No contract involving more than 150 francs or lire can be proved, according to the provisions of the French²⁸ and Italian²⁹ Civil Codes, exclusively by parol testimony if the contract is civil and not commercial. In Austria and Germany, on the other hand, there is no similar legislation, all ordinary parol contracts being enforceable.

AUSTRIA. A contract falling within Article 1341 of the French Civil Code, which has been executed in Paris, will be enforced by the Austrian courts notwithstanding the absence of all written proof.³⁰ The Austrian courts say that the mode of proof is governed by the law of the forum and that the Austrian provisions relating to proof must therefore control. In reality the courts appear to be influenced by considerations of policy. As the contract was valid, though unenforceable, under the law of the place of contracting, and would have been both valid and enforceable, if it had been made within the territory of the forum, it seemed reasonable to the Austrian courts that such a contract should be enforced.

v. Douglas (1847, N. Y. Sup. Ct.) 4 Denio, 305 (contract for sale of land); *Anderson v. May* (1872, Tenn.) 10 Heisk. 84 (contract for lease of land); *Wolf v. Burke* (1893) 18 Colo. 264, 32 Pac. 427 (contract for sale of land); *Howell v. North* (1913) 93 Neb. 505, 140 N. W. 779 (contract for sale of land).

To the effect that the seventeenth section affects the substantive rights of the parties, see *Hunt v. Jones* (1879) 12 R. I. 265; *Houghtaling v. Ball* (1853) 19 Mo. 84, (1855) 20 Mo. 563; *Kling v. Fries* (1876) 33 Mich. 275; *Brockman Commission Co. v. Kilbourne* (1905) 111 Mo. App. 542, 86 S. W. 275; *Canale v. Pauly* (1914) 155 Wis. 541, 145 N. W. 372; *Franklin Sugar Ref. Co. v. Holstein Harvey's Sons Inc.* (1921, D. Del.) 275 Fed. 622.

26. *Barbour v. Campbell* (1917) 101 Kan. 616, 168 Pac. 879. See also *Emery v. Burbank* (1895) 163 Mass. 326, 39 N. E. 1026.

27. *Buhl v. Stephens* (1898, C. C. Ind.) 84 Fed. 922; *Hotel Woodward v. Ford Motor Co.* (1919, C. C. A. 2d) 258 Fed. 322.

28. Art. 1341, French Civil Code.

29. Art. 1341, Italian Civil Code.

30. Supreme Court, April 15, 1911, 8 *Revue de Droit International Privé* (1912) 147; Jan. 25, 1911, cited by Walter, *Internationales Privat-recht* (1921) 198.

GERMANY. The German courts have taken the same view as the Austrian courts and for identical reasons.³¹

ITALY. The law of Italy is found in Article 10 of the Preliminary Dispositions of the Civil Code which provides as follows: "The means of proof of obligations are determined by the laws of the state in which the act was done."

For example, an oral contract of guaranty for less than 150 *lire* entered into in the United States and not complying with the statute of frauds of the place of contracting would therefore be unenforceable in Italy, notwithstanding the fact that it would have been valid and enforceable under Article 1341 of the Italian Civil Code. On the other hand, an oral contract of sale for \$100 would be enforceable in Italy, if it satisfied the *lex loci*, although there was no written evidence as required by Article 1341 of the Italian Civil Code.

FRANCE. There is no Code provision similar to that of Article 10 of the Preliminary Dispositions of the Civil Code of Italy, but the same conclusion has been reached by the courts. The leading case is *Benton v. Horeau*, decided by the Court of Cassation in 1880.³² A contract had been entered into in England involving more than 150 *francs*. The plaintiff sought to introduce evidence that no writing was required by English law and that the contract could be proved in England by oral testimony. The testimony was excluded by the trial court which relied upon Article 1341 of the French Civil Code. It was of the opinion that written evidence was required by the code not only in the interest of the parties, but in the interest of public order and public morality, the object of the provision being the prevention of multiplicity of suits. On the appeal Advocate General Desjardins urged before the Court of Cassation the following points: *First*. That the application of the law of the place of contracting to the mode of proof resulted as a necessary corollary from the adoption of the *lex loci* as the law governing the formal validity of contracts (*locus regit actum*), the mode of proof going *ad litis decisionem*, that is, to the rights and merits of the case. He relied in this connection upon several decisions of the Parliament of Paris which had taken this view with reference to a similar provision contained in the *Ordonnance Des Moulins*.³³ *Second*. That Article 1341 did not establish a rule of public policy, precluding the enforcement of a

31. *Obertribunal Stuttgart*, Sept. 25, 1858, 13 *Seuffert's Archiv* No. 182.

32. Aug. 24, 1880, *Dalloz*, 1880, 1, 447 (1880) 7 *Clunet*, 480.

33. This provision, which was the prototype of Art. 1341 of the French Civil Code, required evidence in writing whenever the amount involved in a contract exceeded one hundred pounds.

foreign contract, valid where made, which did not comply with its provisions. *Third*. That the enforcement by the courts of other states of a contract valid and enforceable under the *lex loci* would give effect to the intention of the parties, which governs in the matter of contracts.

The Court of Cassation adopted the conclusions of M. Desjardins and held that the mode of proof should be governed by English law, there being no French public policy opposed thereto.³⁴

SOUTH AMERICA. The rule that the means of proof are governed by the law of the place where the contract was made appears to be recognized generally in Latin America.³⁵

II

Before considering whether the English case of *Leroux v. Brown* or the decision by the French Court of Cassation in the case of *Benton v. Horeau* represents the better doctrine in the Conflict of Laws, it will be expedient to study the American decisions other than those relating to the Conflict of Laws, which throw light upon the nature of the statute of frauds. The unsatisfactory state of our law in the matter of the statute of frauds in its relation to the Conflict of Laws has resulted largely from the confusion in the decisions relating to the nature of the statute in general. If it can be shown by a proper analysis of the cases that the statute of frauds affects the substance of the contract and not merely procedure, the greatest

34. To the same effect *Beaulieu v. Roy*, Trib. Civ. de la Seine, June 12, 1887, (1887) 14 *Clunet*, 332; *Rich y Trutana v. Suarez de Mendoza*, Trib. Civ. de la Seine, Feb. 9, 1906 (1908) 35 *Clunet*, 1132; *Lord Abdy v. Lady Abdy*, Cass. June 14, 1899, (1899) 26 *Clunet*, 804, Dalloz, 1900, 1, 45; *Abdy v. Lady Abdy*, App. Amiens, March 15, 1900, (1900) 27 *Clunet*, 977; affirmed by Court of Cassation, Feb. 6, 1905, Dalloz, 1905, 1, 481; see also *Princess Ronkia & Prince Fahar Ben Aiad v. Kramer*, Cass. May 23, 1892, (1892) 19 *Clunet*, 1176; *Begg v. Le Curateur de l'Arondissement de Fort de France*, Court of Martinique, May 18, 1878, (1878) 5 *Clunet*, 507.

35. Art. 12, Intr. Brazilian Civil Code; art. 47 Brazilian Bills of Exchange Act (1908); Carrio, *Apuntes de Derecho Internacional Privado* (1911) 384; Verdia, *Tratado elemental de Derecho Internacional Privado* (1908) 302; *Restrepo-Hernandez, Derecho Internacional Privado* (1914) 532.

Art. 2 of the Convention on Civil Procedure, concluded at Montevideo, provides: "The proofs will be admitted and appreciated according to the law of the place which governs the juridical act giving rise to the litigation.

"Excepted from this provision are modes of proof which, by reason of their nature, are not authorized by the law of the place where the action is brought."

stumbling-block in the way of a proper solution of our problem from the standpoint of the Conflict of Laws will have been removed.

From the standpoint of internal law it has been held (1) that a contract not complying with the terms of the statute is *void*; (2) that such a contract is *voidable*; (3) that the contract is *unenforceable*. Those supporting the third view disagree again as to (a) whether the statute of frauds involves a rule of evidence; (b) whether it lays down a rule of remedial procedure; or (c) whether it affects the substance of the contract.

Let us consider these different views and try to ascertain the extent to which they are consistent with the decisions of our courts relating to the statute of frauds. We may test the matter by an examination of the following propositions; which most of the courts support:

(1) The note or memorandum may be executed at any time before suit is brought, but not later.³⁶

(2) The statute may be satisfied although the writing is not made by the parties as the expression of their agreement. A letter to a third party may be sufficient,³⁷ or a letter repudiating the agreement after stating the terms of the bargain.³⁸

(3) An oral agreement within the statute of frauds will be enforced unless the statute is affirmatively pleaded.³⁹

(4) The defendant may admit that there was an oral contract and yet rely on the statute.⁴⁰

(5) Although the contract is not enforceable, it may be proved if its relation to the suit is collateral only.⁴¹

36. *Bird v. Munroe* (1877) 66 Me. 337; *Thayer v. Luce* (1871) 22 Ohio St. 62; *Sheehy v. Fulton* (1894) 38 Neb. 691, 57 N. W. 395; *White v. Dahlquist Mfg. Co.* (1901) 179 Mass. 427, 60 N. E. 791; *Mladich v. McEneely* (1918) 212 Ill. App. 435; see also *Bill v. Bament* (1841, Exch.) 9 M. & W. 36.

37. *Jacobson v. Hendricks* (1910) 83 Conn. 120, 75 Atl. 85; *Spangler v. Danforth* (1872) 65 Ill. 152; *Marks v. Cowdin* (1919) 226 N. Y. 138, 123 N. E. 139; see also *Gibson v. Holland* (1865) L. R. 1 C. P. 1.

38. *Dury v. Young* (1882) 58 Md. 546; *Louisville Asphalt Varnish Co. v. Lorick* (1888) 29 S. C. 533, 8 S. E. 8; *Willis v. Imperial Underwear Co.* (1916 Sup. Ct.) 159 N. Y. Supp. 729; see also *Bailey v. Sweeting*, *supra* note 7.

39. 1 Williston, *Contracts* (1921) 1017. There is much disagreement concerning the manner of taking advantage of the statute. In many jurisdictions the defendant may do so under the general issue. See Page, *Contracts* (2d ed. 1920) sec. 1418; Ann. Cas. 1912 D. 46, note.

40. *Carpenter v. Murphy* (1918) 40 S. D. 280, 167 N. W. 175.

41. *Vaught v. Pettyjohn* (1919) 104 Kan. 174, 178 Pac. 623; *Wilhelm v. Herron* (1920) 211 Mich. 339, 178 N. W. 769; *Grisham v. Lutric* (1898) 76 Miss. 444, 24 So. 169; *Perkins v. Allnut* (1913) 47 Mont. 13, 130 Pac. 1; *Coe v. Griggs* (1882) 76 Mo. 619.

(6) The statute of frauds does not affect contracts made prior to its enactment.⁴²

Do the above propositions lend color to the view that the contract is *void*? Manifestly not. A void contract is a contract without legal effect. The propositions above set forth show conclusively that a contract not satisfying the statute of frauds is not destitute of legal effect.⁴³ There are many cases, nevertheless, which inaccurately describe such a contract as *void*. Such statements are generally made in connection with statutes declaring a contract not complying with the terms of the statute as "invalid" or "void," but sometimes also when the statute provides that "no action shall be brought."⁴⁴ The result in these cases is generally the same as would follow if the contract were regarded as "voidable"⁴⁵ or "unenforceable."⁴⁶

If a contract not satisfying the statute of frauds is not void, should it be deemed to be "voidable" or merely "unenforceable"?

"... A voidable contract," says Anson, "is a contract with a flaw of which one of the parties may, if he please, take advantage. If he chooses to affirm, or if he fails to use his power of avoidance within a reasonable time so that the position of parties becomes altered, or if he takes a benefit under the contract, or if third parties acquire rights under it, he will be bound by it."⁴⁷

"The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of proof owing to lapse of time, want of written form, or failure to affix a revenue stamp. Writing in the first cases, a stamp in the last, may satisfy the requirements of law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract is unimpeachable, only it cannot be proved in court."⁴⁸

42. *Keeffe v. Keeffe* (1912) 19 Calif. App. 310, 125 Pac. 929; *Wilson v. Owens* (1897), 1 Ind. Terr. 163, 38 S. W. 976; *Chaffe v. Benoit* (1882) 60 Miss. 34; *Dunn v. Tharp* (1845) 39 N. C. 7; *Hodges v. Johnson* (1855) 15 Tex. 570; *Collin v. Kittelberger* (1916) 193 Mich. 133, 159 N. W. 482; *McGavock v. Ducharme* (1916) 192 Mich. 98, 158 N. W. 173; *Dean v. Williams* (1910) 56 Wash. 614, 106 Pac. 130; *contra: Baker v. Herndon* (1855) 17 Ga. 568; *Kingley v. Cousins* (1860) 47 Me. 91.

43. Such a verbal agreement was regarded in the light of a continuing offer by Bigelow, J., in *Marsh v. Hyde* (1855, Mass.) 3 Gray, 331, which becomes binding upon compliance with the statute. If that were so, all the elements of a contract would have to exist at the time of the making of the note or memorandum. This is not the law, however.

44. 2 Page, *op. cit. supra* note 39, sec. 1400.

45. *Ibid.* sec. 1398.

46. *Ibid.* sec. 1399.

47. Anson, *Contract* (Corbin's ed. 1919) 19.

48. *Ibid.* 19-20.

According to Anson the statute of frauds would render the contract not complying with its terms "unenforceable" rather than "voidable."

Professor Corbin in his notes to the above passages from Anson agrees with his conclusion, but takes exception to the statement that the difference between a "voidable" and an "unenforceable" contract "is mainly a difference between substance and procedure." Says Professor Corbin:⁴⁹

"In the case of a *voidable contract*, the acts of the parties operate to create new legal relations. These are usually described as including present rights and duties just as in the case of a valid contract, but subject to the power of avoidance at the will of one of the parties. Another way of describing a voidable contract is to say that there are no contractual rights or duties existing but that one of the parties has an irrevocable power to create them.

"The term *unenforceable contract* includes both void contracts and voidable contracts after avoidance. The author uses the term so as to describe certain other legal relations. When a contract has become unenforceable by virtue of the statute of limitations, the obligor or debtor has a power to create a new right in the other party as against himself by a mere expression of his will and without going through the formalities of contract. He cannot, however, as in a voidable contract, destroy the existing rights of the other party or create new rights in himself as against that other. When a contract is unenforceable by reason of the statute of frauds, either party has the legal power to create rights as against himself by signing a written memorandum, he has no such power to create rights in his own favor. The case of the revenue stamp is somewhat different. In these cases a legal relation exists that is different from that existing in the case of a void contract or of a voidable one. It appears that this difference is not as the author says 'mainly a difference between substance and procedure.' The difference between a power to create a right against another person and a power to create a right against only oneself is not merely procedural."

In the light of the foregoing a contract not satisfying the requirements of the statute of frauds is neither void nor voidable, but merely unenforceable. The important question remains, however, whether such lack of enforceability results from a rule of evidence, from a rule of remedial procedure, or from a rule of substantive law.

It is often said that a contract not complying with the statute of frauds is unenforceable for want of proper evidence. Anson appears to entertain this view. Browne⁵⁰ also, the

49. *Ibid.* 20; see also Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 169, 179-181.

50. Browne, *Statute of Frauds* (5th ed. 1895) sec. 115, and note. In Iowa this view has been adopted expressly by legislation. Ann. Code, 1897,

learned writer on the statute of frauds, has been instrumental in giving currency to this doctrine, which has been expressly adopted also in Iowa by statute.

"In previous editions of this treatise," says Browne, "the operation of the statute has been defined, as the prescription of a *rule of evidence*. It is still believed that this view is the true one, and that cases which are inconsistent with it rest upon uncertain ground."⁵¹

Notwithstanding the strong support which the above theory has received, it cannot be approved. The evidence theory is out of harmony with the propositions above mentioned. For example, most courts hold that a memorandum made after the suit has been started does not satisfy the statute.⁵² If the statute prescribed merely a rule of evidence a different result would have to be reached. The fact also that a parol agreement within the statute of frauds may be proved for purposes other than that of enforcing it shows that the want of enforceability does not result from a rule of evidence.⁵³ Were it true that the statute of frauds lays down a rule of evidence, a contract not complying with its requirements could not have been shown for any purpose.

The question remains therefore whether the statute of frauds lays down a rule of remedial procedure or whether it affects the substance of the contract. In this country Mr. Justice Loring⁵⁴ and Professor Williston⁵⁵ have taken the former view, while Professor Corbin⁵⁶ has reached the opposite conclusion.

Can it be said that any one of the six propositions above mentioned, which the courts have laid down with respect to the statute of frauds, indicates that the statute is one of remedial procedure? The answer will depend of course upon the definition of the terms "substance" and "procedure." If substantive law be regarded as defining *rights*, while procedure determines *remedies*, the statute of frauds would have to be classified as

sec. 4625. As regards contracts for the sale of goods, the Uniform Sales Act has now substituted "shall not be enforceable by action" for the former provision. Iowa, Laws, 1919, ch. 396, sec. 4.

51. Browne, *op. cit. supra* note 50, sec. 115a, note 1. See also *Heaton v. Eldridge* (1897) 56 Ohio St. 87, 99, 46 N. E. 638, 639; *Buhl v. Stephens* (1898, C. C. Ind.) 84 Fed. 922; *Crane v. Powell* (1893) 139 N. Y. 379, 34 N. E. 911.

52. See Proposition 1, *supra* p. 333.

53. See Proposition 5, *supra* p. 333.

54. (1875) 9 AM. L. REV. 453.

55. Williston, *Sales* (1909) sec. 71; 1 Williston, *Contracts* (1920) sec. 527.

56. *Cases on Contracts* (1921) 1475, note. See also Lorenzen, *Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws* (1911) 20 YALE LAW JOURNAL, 427, 461.

one of procedure. Salmond shows, however, that the above distinction between *jus* and *remedium* is inadmissible, for, as he points out, there are, on the one hand, many rights belonging to the sphere of procedure, and on the other hand, a rule defining the remedy may be as much a part of the substantive law as are those which define the right itself.

"To define procedure as concerned not with rights, but with remedies," says the learned writer,⁵⁷ "is to confound the remedy with the process by which it is made available.

". . . The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quod ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained."

Expressing the latter in a somewhat different way, we may say that "substance" includes all rules determining the legal relations which the courts will declare when all facts have been made known to them, whereas "procedure" relates to the process or machinery by which the facts are made known to the courts.

Speaking of the statute of frauds, Salmond makes the following observations:⁵⁸

"An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing. In the former case the writing is the exclusive evidence of title; in the latter case it is part of the title itself. In the former case the right exists but is imperfect, failing in its remedy through defect of proof. In the latter case it fails to come into existence at all. But for most purposes this distinction is one of form rather than of substance."

As shown above, a contract within the statute of frauds and not complying with its terms is not void. Salmond's statement that such a contract is void is therefore not strictly accurate. The statute confers on the party who has not signed a memorandum or satisfied the seventeenth section in some other man-

57. Salmond, *Jurisprudence* (6th ed. 1920) 437-438.

58. *Ibid.* 439.

ner, a legal "privilege" not to perform what he has orally promised. One additional fact is required to make the contract perfect—the signing of the memorandum, or, if the case falls within the seventeenth section, the acceptance of part of the goods or the giving of earnest money to bind the contract, or in part payment. The party who has not signed the memorandum has the legal "power," by signing such memorandum, of creating in himself a legal duty to perform. The rule that a note or memorandum may be executed at any time before suit is brought, but not later, determines merely the *time* when the operative facts may come into existence. All agree that the "cause of action" must exist *when suit is brought*. "Cause of action" means the necessary *operative* facts to the creation of *present* or *instant* duty. Evidently a *writing* is one of these facts. The rule that the statute may be satisfied although the writing is not made by the parties as the expression of their agreement, defines the sort of fact that the law on grounds of social policy permits to have operative effect, showing the purpose with which the note or memorandum is made to be immaterial. The rule that an oral agreement within the statute of frauds will be enforced unless the defense is affirmatively pleaded is of course a rule of procedure, indicating which party must make known to the court the existence or non-existence of the writing. A similar rule exists with respect to contributory negligence, illegality, etc. But this does not prove that the statute of frauds, contributory negligence and illegality are procedural. The rule that a contract, although not enforceable because of the statute of frauds, may be proved for other purposes, shows that the statute does not embody a rule of evidence, which would exclude oral testimony in all cases. The rules also that the defendant may admit the execution of the contract and yet rely on the statute and that the statute of frauds does not affect contracts made prior to its enactment, indicate that the statute affects the substance of the contract.

All of the above goes to show that the lack of enforceability of the oral contract does not result from the violation of a rule of evidence, nor because the requirement of a written memorandum belongs to the process by which the operative facts are made known to the courts, but because a rule of substantive law has decreed that no rights or duties shall arise in the absence of such a memorandum. As the plaintiff has no legal *right*, but simply a beneficial liability, his offer to prove an oral contract is necessarily excluded, it being irrelevant to the issue raised by the plea of the statute of frauds. It is manifest, however, that as the statute of frauds determines the legal relations resulting from offer and acceptance, it affects substance and not

merely procedure. This is true without reference to the particular wording of the statute, that is, whether it provides that "no action shall be brought," that the contract "shall not be allowed to be good," or that it shall be "invalid" or "void."⁵⁹

Even if it were conceded for the sake of argument that the statute of frauds falls fairly within the definition of a procedural rule, it would not follow that it may not be "substantive" as well. If substantive law be defined in the traditional manner as "rules determining rights and duties," it is evident that the statute of frauds falls also within that definition. The test of a right-duty relationship is whether or not the breach of the duty is remediable. From this it follows that a statute affecting the entire existence of a legal remedy in a given state of facts is a rule determining rights and duties. If this be true, there is no reason why, if sound policy requires it, the statute of frauds should not be controlled by the *lex loci contractus* in the Conflict of Laws.

III

From the standpoint of the Conflict of Laws there is the greatest need of restricting the term "procedure" to its proper signification, for, according to the traditional rule in this subject, all matters of procedure are submitted to the law of the forum. English and American courts have been too prone to say in the past that a particular matter belonged to procedure, and that it was controlled therefore by the law of the forum. They have given to the term a very wide meaning,⁶⁰ with the consequence, that many matters, which on principle and according to the established practice of other countries should be governed by some other law, are subjected to the law of the place where the suit happens to be brought. The reason for this attitude on the part of the Anglo-American courts is not far to

59. If the nature of the statute of frauds were dependent upon the specific wording of the statute, whether it read that "no action shall be brought" or that the contract is to be "invalid" in the absence of a written memorandum, we might have the singular result that a contract unenforceable under the law of the place of contracting and void under the law of the forum will nevertheless be enforced. The statute of the forum would be inapplicable because the contract was made outside of the jurisdiction and the statute of the place of contracting would be disregarded on the ground that the procedural laws of a state are not entitled to extra-territorial recognition and enforcement. See *Marie v. Garrison*, *supra* note 24; Wharton, *Conflict of Laws* (3d ed. 1905) 1445-1446.

60. "English lawyers give the widest possible extension to the meaning of the term 'procedure.' The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right." Dicey, *Conflict of Laws* (3d ed. 1922) 762.

seek. The tendency of the common law has always been to be exclusive. It is no wonder, therefore, that when the English courts were first asked to enforce rights "created" by a foreign system of law, the civil law, they should welcome any doctrines which would operate restrictively in the recognition and enforcement of such rights. They willingly accepted therefore the doctrine of the Dutch school which gave to the term "procedure" a very extensive meaning.⁶¹ By subjecting to the law of the forum all matters belonging to procedure and giving that term the widest possible meaning, the field for the application of "foreign law" became necessarily reduced. It was natural also that the continental countries, whose jurisprudence rests upon a common basis, the Roman law, should have been the first to apply a more liberal doctrine with reference to each other. There is no good reason, however, why, after an acquaintanceship with the continental system extending over a period of a century and more, the Anglo-American courts should not be willing to give to "foreign rights" the same effect that they have abroad.

So far as the process or *machinery* for the enforcement of "foreign" rights is concerned, each litigant must of course take it as he finds it, and so far as he is prejudiced thereby it is a loss which cannot be avoided. It is impossible to set up a special machinery for "foreign" causes of action that may be brought before a domestic court. "Foreign" substantive rights, however, should be enforced according to their original content. As regards the statute of frauds, there is no more difficulty in establishing its legal effect abroad than there is in proving the legal effect of any other foreign operative facts.

Much difficulty may be experienced in a given case in determining whether effect should be given to the foreign operative facts, but this is hardly true so far as they relate to the statute of frauds. The very fact that there are in the United States so many decisions involving the Conflict of Laws which have held that the statute affects the substantive rights of the parties would go to show the existence of a policy that a foreign contract should be controlled, as regards the statute of frauds, by the law governing such contract in other respects. Some of these decisions, it is true, base their conclusion upon the particular wording of the statute, which stated that a contract not complying with its terms should be "invalid" or "void," but it is safe to assume that the special wording of the statute was seized upon merely to support a conclusion which had been reached on other grounds, namely, the reasonable requirements

61. See Lorensen, *Huber's De Conflictu Legum* in Wigmore's *Celebration Legal Essays* (1919) 214.

of the situation. Moreover, in a number of strong decisions the same result was reached although the particular statute provided that "no action shall be brought." The authors also who have examined the problem from the standpoint of the actual requirements of interstate or international business, instead of disposing of it in a more or less mechanical manner, have felt the reasonableness of the doctrine laid down by the French Court of Cassation in *Benton v. Horeau* and the unreasonableness of the rule adopted by *Leroux v. Brown*.⁶² When a valid contract has been entered into in a certain state or country, which does not require a memorandum in writing, justice would seem to require the enforcement of the contract elsewhere. A non-resident of the state in which such contract was made should not be allowed to set up the statute of frauds of his residence if he fails to live up to the contract and suit has to be brought against him in the state of his residence. A person who in the execution of a contract has shown the care which is required by the *lex loci* should have the assurance that his interests will be protected by the courts of other states. As the failure to secure a written memorandum cannot be regarded as negligent in the above case, the law of the place of execution not requiring a written memorandum, sound policy would seem to require the enforcement of the contract abroad, without regard to the existence of a different local provision in the jurisdiction in which the suit may be brought. It is to be hoped therefore that the states which have adopted the Uniform Sales Act will not be misled by the fact that it has accepted in the matter of the statute of frauds the wording of the English Sale of Goods Act, so as to conclude that the erroneous doctrine of *Leroux v. Brown* must be followed.⁶³

The conclusion reached is supported not only by strong American authority, but also by the law of continental⁶⁴ and South American⁶⁵ countries, and by the opinion of the great majority of foreign jurists.⁶⁶

62. See Williston, *Sales* (1909) sec. 126; 1 Williston, *Contracts* (1920) sec. 600.

63. The correct view has been taken in *Mason-Heflin Coal Co. v. Currie* (1921) 270 Pa. 221, 113 Atl. 202; *Franklin Sugar Refining Co. v. Holstein Harvey's Sons Inc.*, *supra* note 20.

64. *Supra* p. 330. The law of Austria and Germany is opposed, but these countries have no legislation similar to our statute of frauds. The contrary view leads therefore in these countries to the enforcement of foreign contracts which are valid but unenforceable under the law of the place of execution.

65. *Supra* p. 332.

66. A distinction is made between the "mode" of proof and its "administration." The former is deemed to go to the substance and the latter as belonging to procedure. Asser & River, *Eléments de Droit International*

Privé (1884) 167-168; Audinet, *Principes Elémentaires de Droit International Privé* (2d ed. 1906) 364; Bar, *Private International Law* (Gillespie's transl. 1892) 864; Bard, *Précis de Droit International Privé* (1883) 312; Bourdon-Viane & Magron, *Manuel Elémentaire de Droit International Privé* (1883) 297; Carrio, *Apuntes de Derecho Internacional Privado* (1911) 384; 3 Catellani, *Il Diritto Internazionale Privato* (1888) 586; (1905) 32 *Clunet*, 453 (1905) 453; 2 Conde y Luque, *Derecho Internacional Privado* (1907) 378; Despagnet & de Boeck, *Précis de Droit International Privé* (5th ed. 1909) 534; Diena, *Principii di Diritto Internazionale Privato* (1910) 374, 376-377; Donnedieu de Vabres, *L'Evolution de la Jurisprudence Française en Matière de Conflits des Lois* (1905) 217; Duguit, *Des Conflits de Législations Relatifs à la Forme des Actes Civils* (1882) 125; Esperson (1884) 11 *Clunet*, 175; 1 Fiore, *Le Droit International Privé* (Antoine's transl. 1907) 215-216; 1 Foelix, *Traité de Droit International Privé* (4th ed. 1866) 453; Foignet, *Manuel Elémentaire de Droit International Privé* (6th ed. 1921) 342; Gestoso y Acosta, *Nuevo Tratado de Derecho Procesal, Civil, Mercantil y Penal Internacional* (1912) 336; Kosters, *Het Internationaal Burgerlijk Recht in Nederland* (1917) 205; 8 Laurent, *Le Droit Civil International* (1881) 40; 2 Massé, *Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Commercial* (2d ed. 1861) 42; Meili, *Das Internationale Zivilprozessrecht* (1906) 407; Pillet, *Principes de Droit International Privé* (1903) 489; Restrepo-Hernandez, *Derecho Internacional Privado* (1914) 532; Rodrigues Pereira, *Projecto de Código de Direito Internacional Privado* (1911) art. 78, pp. 42-43; 3 Rolin, *Principes de Droit International Privé* (1897) 2-3; Surville & Arthuys, *Cours Elémentaire de Droit International Privé* (6th ed. 1915) 602; Synnestvedt, *Le Droit International Privé de la Scandinavie* (1904) 291; Torres Campos, *Elementos de Derecho Internacional Privado* (4th ed. 1913) 359; Valery, *Manuel de Droit International Privé* (1914) 755; 2 Vareilles-Sommières, *Synthèse de Droit International Privé* (1897) 284; Verdia, *Tratado Elemental de Derecho Internacional Privado* (1908) 302; Weiss, *Manuel de Droit International Privé* (6th ed. 1909) 655-656; 5 Weiss, *Traité de Droit International Privé* (2d ed. 1913) 509-512.

The Institute of International Law has expressed the same view. 2 *Annuaire de l'Institut de Droit International* (1878) 151.

A few writers would submit both questions to the *lex fori*. Beauchet, *Du Conflit des Lois Française et Etrangère en Matière de Preuve Testimoniale* (1892) 19 *Clunet*, 359; 1 Gierke, *Deutsches Privatrecht* (1895) 247; Mittermaier, 13 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* (1830) 316; Schäffner, *Entwicklung des internationalen Privatrechts* (1841) 205; Jettel, *Handbuch des internationalen Privat- und Strafrechts* (1893) 150; 1 Unger, *System des österreichischen Privatrechts* (1892) 208; Wach, *Handbuch des deutschen Zivilprozessrechts* (1885) 127; Walker, *Internationales Privatrecht* (1921) 198.

Referring to the French provision (art. 1341 of the Civil Code), Bar says: "It is plain that in such a case the question is not one as to the weight of evidence in the true sense, i. e., as to whether the judge is persuaded of the truth of the alleged facts by the materials laid before him—but is rather one as to the form of the transaction and the consequences that attach to the neglect of that form. This is obvious from the fact that, failing an admission by the defender, the pursuer must lose his action, even although far stronger evidence than that which is required should be tendered—e. g., instead of a private document, ten witnesses who with one voice speak to the agreement of the parties." *Private International Law* (Gillespie's transl. 1892) 864.

There is no reason why even the courts of those states in which it is established, as regards internal law, that the statute of frauds affects procedure, should not apply the *lex loci contractus* in the Conflict of Laws. The term "procedure" may have one meaning in matters of internal law, and a narrower meaning from the point of view of the Conflict of Laws. A precedent for this has been furnished us by the Supreme Court of the United States in the matter of "penal" laws. It is a well recognized principle in the Conflict of Laws that rights arising by virtue of a penal statute are not enforceable extraterritorially. In *Huntington v. Attrill*⁶⁷ the Supreme Court recognizes that the term "penal" may have a much wider meaning for purposes of internal law than it should have in the Conflict of Laws, that a statute might be "penal" for local purposes and yet "create" rights which should be enforced internationally. Instead of accepting a definition of what constitutes a "penal" law which had been found suitable for the needs of internal law and applying that definition mechanically in the field of the Conflict of Laws, it took the correct position of determining in the first place what sound policy demanded from the standpoint of the Conflict of Laws and of thereupon defining the term "penal" in a way to attain the end in view. Should the liability of directors imposed by statute for a failure to file certain reports be enforced by the courts of other states? The Supreme Court was of the opinion that it should, and it framed for that purpose an international definition of what constitutes a "penal" law.⁶⁸ In the same way, as regards the statute of frauds. The good policy of enforcing a foreign contract which is valid and enforceable under the foreign law being apparent, the term "procedure" should be defined in a way to exclude therefrom questions involving the statute of frauds.

May it not be, however, that the suggested narrower definition of "procedure" in the Conflict of Laws is impossible, in view of the established law in the matter of the statute of limitations? This argument was made by counsel in *Leroux v.*

"The exercise of a right is assured in a complete manner only if its existence can be proved in case of contest. The mode of proof is inseparable from the right itself There is a close connection between the right and the means by which its existence is proved, and it is this connection which our opponents fail to recognize." Asser & Rivier, *Éléments de Droit International Privé* (1884) 167-168.

"The object of these laws is to compel the parties to prepare the best proof, and to punish them, if they have not done so But such a law cannot, without unjust retroactivity, be applied to an omission which occurred in a country where it was permissible and lawful." 2 Vareilles-Sommières, *Synthèse de Droit International Privé* (1897) 284-285.

67. (1892) 146 U. S. 657, 13 Sup. Ct. 224.

68. So also *Huntington v. Attrill* [1893, P. C.] A. C. 150.

Brown and the opinion of Maule, J., shows that it had great weight with the court. In this country also the doctrine that the ordinary statute of limitations is deemed to affect procedure and to be subject therefore to the *lex fori* has had a tendency to fasten the same doctrine upon our courts in the matter of the statute of frauds. We have seen, however, that a good many courts in dealing with the statute of frauds have declined to be bound by the suggested analogy. Analytically the statute of limitations and the statute of frauds present more or less the same problem. Upon principle both affect the substantive rights, duties, privileges, etc., of the parties.⁶⁹ The contrary became, however, early established in the Conflict of Laws of both England and the United States as regards the statute of limitations.⁷⁰ On the continent, on the contrary, both are deemed, by the French and other courts, to go to the substance and to be controlled by the law governing the substantive rights of the parties.⁷¹ Story also originally took the view that a cause of action barred by the law of the state or country governing it in other respects should be regarded as barred everywhere else.⁷² Although Story's view did not prevail in our courts, it is significant that in this country it has been adopted through legislation in many states. In the matter of statutory causes of action also the fundamental rule is frequently abandoned and the time within which suit must be brought regarded as a substantive part of the cause of action.⁷³ All this goes to show that if the question were *res integra* policy might demand, to the extent indicated, a recognition of the statute of limitations existing at the place whose law controls the transaction in other respects. However that may be, it manifestly cannot determine the policy of our law with respect to the statute of frauds. The problem of the statute of limitations in the Conflict of Laws is quite different from that raised by the statute of frauds, so that the conclusions reached as regards the former cannot reasonably afford a solution for the latter. We must beware lest we

69. "The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect is the same, although their form is different." Salmond, *Jurisprudence* (6th ed. 1920) 440.

70. *Townsend v. Jemison* (1850, U. S.) 9 How. 407; *McElmoyle v. Cohen* (1839, U. S.) 13 Pet. 312; *Don v. Lippmann* (1837, H. L.) 5 Clark & Fin. 1.

71. As to the statute of limitations, see COMMENTS (1919) 28 YALE LAW JOURNAL, 492, 493; as to the statute of frauds, see *supra* p. 330.

72. *Leroy v. Crowninshield* (1820, C. C.) 2 Mason, 151.

73. *Davis v. Mills* (1904) 194 U. S. 451, 24 Sup. Ct. 692.

determine legal questions, which should be controlled by considerations of social utility and policy, by a purely mechanical process.

The wide meaning given to the term "procedure" in the Conflict of Laws has already done much mischief. Our courts would do well to keep in mind the real meaning of the rule that all matters of procedure are governed by the local law of the forum. The sole object of the rule is to enable the courts to operate the judicial machinery in the customary manner. There are vast differences in the technical rules controlling the conduct of litigation under the systems of procedure prevailing in the different countries and any attempt to try a "foreign" cause of action in accordance with the rules of the state or country in which it arose would be doomed to failure. A foreign litigant must therefore of necessity conform to the procedure of the court in which he seeks to enforce his claim. There is no reason, however, why a matter affecting the merits of the case or the operative effect of facts when once proved should not be controlled by the law governing the substantive rights of the parties, provided it is of a nature to pass conveniently and without ethical shock through the legal machinery of the forum.⁷⁴ The label attaching to such matter from the standpoint of internal law matters little. It may be clearly "substantive" or both "substantive" and "procedural" or possibly even *exclusively* "procedural," as these terms may have been defined in the past.

IV

In the light of the above we may concur in the view prevailing on the continent and in Latin-America that the "modes of proof" should be governed, at least in the matter of the statute of frauds, by the law controlling the contract in other respects. More accurately speaking, the statement should be that it is governed by the law determining the *formalities* with which contracts must be executed.⁷⁵ Whether these should be deemed

74. Even the "burden of proof," as distinguished from the "burden of going forward," may have to be controlled by the law governing the substantive rights of the parties.

75. "The laws concerning proof relate closely to those concerning the form of acts, although they are not fully identical therewith. The rule *locus regit actum*, which authorizes parties to an act to make use of the forms prescribed by the law of the place where they are, signifies necessarily also that as regards the proof of these respective rights they may invoke the same law of the *lex loci actus*. If it were otherwise, the rule would mean nothing." Pillet, *Principes de Droit International Privé* (1903) 489.

controlled by the law of the place of contracting, or by the law of the place of performance, or, if the contract relates to land, by the law of the situs, cannot be gone into here. In another place the writer has suggested that a rule in the alternative would best meet the needs of interstate or international business.⁷⁶ The same arguments would be applicable to the statute of frauds. The fact that a contract which does not meet the requirements of the statute of frauds comes into existence and is only unenforceable raises the question, however, whether the *lex fori* should not be recognized as one of the alternatives, so that such a contract will be enforced if it satisfies the law of the forum. Lainé,⁷⁷ a distinguished authority on the subject of the Conflict of Laws in France, has suggested in general that if a transaction satisfies the requirements of the forum as to form, effect should be given to it, although it does not comply with the requirements of the *lex loci* or the law governing the transaction in other respects. By reason of the fact that the statute of frauds has been so often regarded as procedural, it would seem that Professor Lainé's suggestion might perhaps afford a happy solution for the problem before us.⁷⁸ Policy requires that international transactions be sustained as far as possible; and as it is extremely difficult, if not impossible, to find a unitary rule that will give desirable results in its application to the multitudinous interstate or international transactions of ever varying character, there would appear to be no way of attaining the desired end except by a recognition of rules in the alternative. Ordinarily such alternatives will have reference to the laws of states or countries with which the transaction has a close connection at the time of its execution. When, however, the mutual agreement of the parties is conceded, and the required mode of expressing that agreement is alone in issue, as in the case of the statute of frauds, it might not be improper to enforce such foreign contract if it meets the requirements of the *lex fori*, though it is unenforceable under the *lex loci* or the law governing the transaction in other respects.⁷⁹ Such a solution of the problem would reconcile also

76. *Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws* (1911) 20 YALE LAW JOURNAL, 427, 455-462; *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 *ibid.* 655, 672-673.

77. Lainé (1908) 35 *Clunet*, 681-685.

78. A rule in the alternative has been advocated by eminent foreign jurists. Pillet, *Principes de Droit International Privé* (1903) 490; Surville & Arthuys, *Cours Élémentaire de Droit International Privé* (6th ed. 1915) 604; Synnestvedt, *Le Droit Privé de la Scandinavie* (1904) 291; Verdia, *Tratado elemental de derecho internacional privado* (1908) 302; 5 Weiss, *Traité de Droit International Privé* (2d ed. 1913) 512.

79. An alternative rule in the above sense would do away of course with such difficulties as were raised by the Cuban requirement of "proto-

the decisions of the continental courts. The statute of frauds is said to concern the substance of the contract in France and Italy,⁸⁰ while it is regarded as affecting procedure in Germany and Austria.⁸¹ If we look beyond the formal expression of the rule we find the following: Austria and Germany have no statute of frauds. When a contract made in France, which would be perfectly valid by French law were it not made unenforceable there by Art. 1341 of the Civil Code, is presented before a German or an Austrian court, it appears to be felt that policy requires the enforcement of such contract. The easiest way of reaching this result under the circumstances seemed to be to regard the foreign statute of frauds as a rule of evidence and therefore as procedural. If it were recognized that such a contract is enforceable if it satisfies either the law of the place of execution or the law of the forum there would be no need of stretching the term "procedure" in order to attain a result which appears desirable from an international point of view.

There are those, however, who assume a position which is the exact opposite to the one just stated. Instead of endeavoring as far as possible to enforce contracts not complying with the statute of frauds, they contend that the statute is expressive of a policy of such a fundamental character that no action will lie on a foreign contract, valid and enforceable under the foreign law, if the statute of the forum is not satisfied. This public policy argument has been advanced by Wharton, who says:⁸²

"Statutes directing that no suit shall be sustained, in certain classes of cases, except on written testimony, are based on moral grounds. Their object, as is shown by the title of that which served as the pattern of all others, is to prevent fraud and perjury. Here, then, comes into play the position on which Savigny lays such great stress—that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states."

Similar language is used by a number of courts.⁸³ In nearly all of them, following Wharton's example, the policy and procedure arguments are used interchangeably. Such a mode of reasoning leads, however, to confusion. The two arguments are in their nature quite distinct. If the statute of frauds affects "procedure" from the standpoint of the Conflict of Laws, the colization" in the case of *Reilly v. Steinhart* (1916) 217 N. Y. 549, 112 N. E. 468.

80. *Supra* p. 330.

81. *Supra* p. 330.

82. 2 Wharton, *Conflict of Laws* (3d ed. 1905) sec. 690.

83. *Heaton v. Eldridge*, *supra* note 25; *Barbour v. Campbell*, *supra* note 26.

necessary consequence is that all foreign contracts will be tested by the requirements of the statute of frauds of the forum. If the contract satisfies the statute of the forum it will be enforced, although it is unenforceable under the law of the place of contracting. If it does not meet the requirements of the statute of frauds of the forum, it will not be enforced, although it is valid and enforceable under the *lex loci*. The public policy argument, as it is understood in the Conflict of Laws, comes into operation only when it is conceded that on principle the foreign law is applicable, and effect is denied to the foreign law only *by way of exception*, because of paramount considerations of policy arising in the particular case. The policy argument has, therefore, no meaning, so far as it relates to the statute of frauds, unless the statute is regarded as affecting the substantive rights of the parties. Where the contract does not satisfy the law of the forum it will not be enforced, if the policy argument is accepted, although it is valid and enforceable under the *lex loci*. In this case the result reached is the same as would be the case if the statute of frauds had been regarded by the law of the forum as procedural. The result is not identical, however, if the statute of the forum is satisfied, but the law of the place of contracting is not, so that the contract is unenforceable under the *lex loci*. As the substantive rights of the parties are controlled by the *lex loci* the contract would be unenforceable everywhere, whereas it would be enforced if the statute of frauds of the forum were deemed to be procedural.

If the suit is brought in a jurisdiction taking the correct view—that the statute affects the “substance” of the contract—no action will lie upon the foreign contract if it is unenforceable under the foreign law.⁸⁴ On the other hand, if the contract is enforceable under the foreign law, it should be enforced on principle. But if the statute of frauds of the forum is deemed to rest on paramount moral considerations, as Wharton contends, it would override the foreign law, in the interest of local morality, and allow no action on the contract. The question is, therefore, whether Wharton’s contention is sound. It is submitted that it is not. So far as authority is concerned, there are cases which are inconsistent with the idea that the statute of frauds, while substantive, lays down at the same time a rule of public policy. In these cases effect was given to the foreign contract notwithstanding the fact that such a contract would

84. Where the foreign statute is not an ordinary statute of frauds, but contains a provision that no suit can be brought in the absence of “protolocalization,” which may, however, be compelled by an action at law, the requirement may be disregarded by the courts of other states as a “procedural” one. *Reilly v. Steinhart* (1916) 217 N. Y. 549, 112 N. E. 468.

have been void if it had been made in the jurisdiction of the forum.⁸⁵ This could not have been done if the statute of the forum were expressive of a stringent public policy.⁸⁶ There is but one case which lends support to the public policy argument—that of *Barbour v. Campbell*.⁸⁷ In that case suit was brought in Kansas upon an Idaho contract to pay the debt of another, which was assumed to be valid and enforceable under the Idaho law, the law of the latter state not having been proved. The Supreme Court of the state of Kansas declined to enforce the contract because it did not meet the requirements of the Kansas statute of frauds. The court put its decision on the ground of public policy, but relied exclusively upon Wharton, who appears to use the public policy and procedure arguments interchangeably. It is not certain, therefore, whether the court was aware of the distinction between these arguments, as shown above, and whether it meant in fact to subscribe to the doctrine that the statute of frauds is substantive.⁸⁸

Still less conclusive is the case of *Emery v. Burbank*,⁸⁹ in which suit was brought in Massachusetts against a resident of that state upon an oral agreement to make a will which he had entered into in the state of Maine. Under the Massachusetts statute an agreement to make a will was not valid unless in writing. Although it was assumed in this case also that the contract was good in Maine, it was held to be unenforceable nevertheless in view of the Massachusetts statute. One of the grounds relied upon was the public policy argument. In this connection Mr. Justice Holmes, speaking for the court, said:⁹⁰

“But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here

85. *Wolf v. Burke*, *supra* note 25; *Houghtaling v. Ball*, *supra* note 20; *Halloran v. Jacob Schmidt Brewing Co.* *supra* note 22.

86. Nor is the contract illegal or opposed to public policy from a purely internal viewpoint, so that if executed on both sides neither party could recover what he has given. *Craig v. Vanpelt* (1821, Ky.) 3 J. J. Marsh, 489; *Bates v. Babcock* (1892) 95 Calif. 479, 30 Pac. 605; *Hansen v. Uniform Seamless Wire Co.* (1917, C. C. A. 1st) 243 Fed. 177.

87. *Supra* note 26.

88. This is especially true in view of that fact that the Kansas statute uses the phrase “no action shall be brought” (Gen. Sts. 1915, sec. 4889) which is commonly regarded as laying down a rule of procedure.

89. *Supra* note 26.

90. *Ibid.* 163 Mass. at p. 328, 39 N. E. at p. 1027.

upon such contracts without written evidence, wherever they are made."

The court expressly declined to express an opinion on the point whether the policy would apply also to agreements made by non-residents abroad.

This case lends no support to the proposition that the fourth and seventeenth sections of the English statute of frauds establish a fundamental policy in the face of which no foreign contract can be enforced. *Emery v. Burbank* differs from the cases falling within the sections just referred to in two respects. In the first place, the Massachusetts statute rendered the *contract itself* void, if it did not satisfy the requirements of the statute. The consequence attaching to non-compliance was therefore more severe than would follow from non-compliance where the case falls within the fourth and seventeenth sections of the English statute of frauds. Of more importance, however, is the fact that the agreement in question related to the making of a will. The party sued was a resident of Massachusetts and the court felt that it was the intention of the legislator to protect residents of Massachusetts against agreements of that character unless they were in writing. Such protective policy was deemed to extend also to contracts made by residents of Massachusetts in other states. These special circumstances clearly distinguish the case from those falling within the ordinary statute of frauds.

On principle it is obvious that the doctrine of public policy should not be invoked in the Conflict of Laws, except in a clear case. Is the statute of frauds based upon such moral grounds, as Wharton alleges, that it must control in the interest of the local security all cases brought before its courts? The civilized countries are divided as to the wisdom of requiring written evidence of contracts falling within the fourth and seventeenth sections of the statute of frauds. Some legislators appear to feel that the local conditions are such that the requirement of written evidence is desirable. Others, taking account of the conditions existing in their own countries, appear to conclude that such a requirement would encourage fraud rather than prevent it. Even in England and the United States the opinions of the courts and writers are greatly divided as to the desirability of a statute of frauds.⁹¹ Under these circumstances it

91. "It is only in respect of very special kinds of contracts that written evidence can wisely be demanded by the law. In the case of all ordinary mercantile agreements such a requirement does more harm than good; and the law would do well in accepting the principle that a man's word is as good as his bond. The Statute of Frauds, by which most of these rules of

would seem that a contract which has been entered into in a foreign state or country where written evidence is not required should be enforced elsewhere. Moral considerations of a paramount character, sufficient to warrant a disregard of private rights, not being involved,⁹² the application of the local statute should be restricted to contracts made within the state.⁹³

What has been said above applies not only to the necessity of a memorandum in writing, but also to its sufficiency.

The conclusions of this study may be summed up as follows:

(1) The fourth and seventeenth sections of the statute of frauds affect the substantive rights of the parties and not merely procedure, and matters falling within their provisions are controlled by the law governing the formalities of contracts in general.

(2) The statute of frauds is not expressive of a public policy from the standpoint of the Conflict of Laws, so as to preclude the enforcement of a foreign contract. A contract satisfying the requirements of the proper foreign law will therefore be enforced, although it does not meet the requirements of the statute of frauds of the forum.

(3) The peculiar nature of the statute of frauds makes it desirable, at least as a matter of legislative policy, that contracts not enforceable under the statute of frauds of the state whose law determines the formalities of contracts in general shall be enforced nevertheless if they meet the requirements of the statute of the forum.

exclusive evidence have been established, is an instrument for the encouragement of frauds rather than for the suppression of them." Salmond, *Jurisprudence* (6th ed. 1920) 447.

92. See also Despagnet & de Boeck, *Précis de Droit International Privé* (5th ed. 1909) 534; 8 Laurent, *Droit Civil International* (1881) 51; Weiss, *Manuel de Droit International Privé* (6th ed. 1909) 656; 5 Weiss, *Traité de Droit International Privé* (2d ed. 1913) 519-520.

93. If the principle were adopted in the Conflict of Laws as regards the statute of frauds that a contract is enforceable if it satisfies *either* the law of the place of contracting, *or* the law of the place of performance, the local statute of frauds of the state in which suit is brought would be applicable only if the contract were both made *and* to be performed within such state.

12. THE STATUTE OF LIMITATIONS AND THE CONFLICT OF LAWS*

THE rule of Anglo-American law that the ordinary statute of limitations is procedural in character and is determined therefore in the conflict of laws exclusively by the law of the forum, is so firmly established that we are apt to regard it as the universal rule. Such a conclusion, however, would be very far from the truth. There is perhaps no problem in the conflict of laws with respect to which the courts and writers of the different countries of the world are more strongly divided. In the light of this fact a decision of the Court of Appeals of Milan of March 23, 1916, is of especial interest. *Sala v. Model*, 2 *Rivista di diritto commerciale*, 1916, 896.¹ Action was brought for the breach of a contract which had been entered into in England. The action was barred under the Italian statute of limitations but not under the English statute. The court held that the English statute must yield on grounds of policy to the Italian statute.

There are two principal systems with reference to the general question—the Anglo-American and the continental. The former looks at the question fundamentally as one of procedure;² the latter as one affecting the substantive rights of the parties. The Anglo-American rule follows the rule laid down by the Dutch writers on the conflict of laws of the seventeenth century.³ The continental rule, on the other hand, represents

* (1919) 28 Yale Law Journal 492.

1. The court rested its decision on Art. 12 of the Preliminary Dispositions of the Civil Code, which provides that the foreign legislation shall not be applied in the face of laws touching in any respect the public policy of the forum.

2. *LeRoy v. Crowninshield* (1820, C. C. Mass.) 2 Mason, 151, Fed. Cas. No. 8269; *McElmoyle v. Cohen* (1839, U. S.) 13 Pet. 312; *Townsend v. Jemison* (1850, U. S.) 9 How. 407. See also 48 L. R. A. 625, 6 L. R. A. (N. S.) 658; (1918) 27 YALE LAW JOURNAL, 1078; Dicey, *Conflict of Laws* (2d ed.), rule 193; Minor, *Conflict of Laws*, 522; Story, *Conflict of Laws* (8th ed.), 793; Westlake, *Private International Law* (5th ed.), 328; Wharton, *Conflict of Laws* (3d ed.), 1244–1245.

The law of the forum applies though the parties lived in the foreign jurisdiction until the statute had taken effect. *Thompson v. Reed* (1883) 75 Me. 404; *Bulger v. Roche* (1831, Mass.) 11 Pick. 36; *Power v. Hathaway* (1864, N. Y. Sup. Ct.) 43 Barb. 214.

3. Paul Voet was the first to break with the traditional view. *Ad statutus*, s. 10, n. 1. He was followed by Huber (*Praelectiones juris civilis*, pt. 2, bk. 1, tit. 3, n. 7) and by John Voet (*Ad Pandektas*, bk. 44, tit. 3, n. 12).

the older and more general ⁴ view. The Anglo-American rule is simple and leads always to the application of the law of the forum; the question is only, whether it brings about just results. Under the continental view, on the other hand, the problem arises at the outset whether the rule determining the statute of limitations in the conflict of laws should be the same as the rule governing the substantive rights of the parties in general or whether a special rule should apply. If the former viewpoint is the correct one, different results will be obtained in the different countries corresponding to the differences in the rules adopted by them in the conflict of laws, with reference to the substantive rights of the parties. In the matter of contracts there is the greatest variety of view in this regard.

As regards the limitation of actions arising out of contracts, the Belgian courts say that the law of the domicile of the debtor controls.⁵ The French courts have been in the habit of expressing it in the same manner.⁶ In these cases the *lex domicilii* coincided, however, generally either with the *lex loci contractus* or with the *lex fori*. Most of the French courts expressly adopt the law of the place of contracting.⁷ Some accept the law of the place of performance as the governing law.⁸ A considerable number support the law of the forum.⁹ The Italian courts have consistently held that the statute of limitations is controlled by the law applicable to the substance and effect of the

4. *Bartolus and the Conflict of Laws* (Beale's translation) No. 19. Bartolus applied in the matter of contracts the law of the place of performance. *Ibid.* see also Michel, *La prescription libératoire en droit international privé*, 26 ff.

5. Trib. com. Ostend, March 8, 1888, *Pandectes belges*, 1888, 1081. A stipulation that a foreign law should control was deemed opposed to public policy where the place of performance was in Belgium. Trib. com. Antwerp, May 30, 1862, *Jurisprudence du port d'Anvers*, 1862, 1, 373.

6. Cass. Jan. 13, 1869, D. 69, 1, 135; Trib. Seine, Nov. 28, 1891, *Clunet*, 1892, p. 712.

7. App. Alger, Aug. 18, 1848, S. 49, 2, 64; App. Chambéry, Feb. 12, 1869, S. 1870, 2, 9; Trib. com. Marseilles, Oct. 25, 1880, 8 *Clunet*, 259; App. Bordeaux, March 1, 1889, D. 1890, 2, 89; Apr. 27, 1891, 19 *Clunet*, 1004; Trib. civ. Seine, Nov. 14, 1890, 19 *Clunet*, 987; Apr. 30, 1904, 34 *Clunet*, 417; Trib. Tunis, June 15, 1891, 18 *Clunet*, 1238; Dec. 26, 1898, 25 *Clunet*, 557; Trib. civ. Marseilles, Oct. 31, 1906, 34 *Clunet*, 416.

8. App. Paris, March 29, 1836, *Journal du Palais*, 1835-1836 (3d ed.) 1206; S. 1836, 2, 457; Trib. com. de la Seine, Aug. 3, 1838, affirmed by the court of Paris Feb. 7, 1839, *Journal du Palais*, 1839, 1, 298; Trib. com. Marseilles, Dec. 20, 1865, App. Aix, June 20, 1866, *Journal de jurisprudence commerciale et maritime*, 1866, 1, 36; 1867, 1, 116; App. Bordeaux, Dec. 26, 1876, S. 1877, 2, 108; Trib. civ. Seine, Feb. 19, 1889, 16 *Clunet*, 621.

9. Cass. Jan. 13, 1869, D. 1869, 1, 135; App. Besançon, Jan. 11, 1882, D. 1882, 2, 211; Trib. civ. Seine, Nov. 28, 1891, 19 *Clunet*, 712; Dec. 11, 1893, 21 *Clunet*, 145; App. Rennes, May 20, 1899, 26 *Clunet*, 998; App. Paris, Nov. 15, 1906, 3 *Darras*, 756.

contract.¹⁰ Contracts falling within the provisions of the Civil Code are controlled therefore by Article 9 of the Preliminary Dispositions of the Civil Code,¹¹ and commercial contracts by Article 58 of the Commercial Code.¹² But whether the foreign statute of limitations would be enforced where the action would have been barred by the statute of limitations of the forum had apparently not been presented to the Italian courts before the case of *Sala v. Model*, *supra*.¹³

The fundamental rule of Anglo-American law which applies the law of the forum as regards the limitation of actions, controls only where the foreign statute bars the action and does not discharge the obligation of the contract. Where the law of the state governing the substance of the contract has *discharged the obligation* of such contract as a result of the running of the statute of limitations, instead of merely barring the remedy, it is recognized in both England and the United States that no action will lie, although the suit would not have been barred under the local statute of limitations of the forum.¹⁴ This is

10. Encyclopedie, Art. 9, Preliminary Dispositions, No. 174.

11. Art. 9 of the Preliminary Dispositions of the Civil Code provides as follows: "The substance and effect of obligations are deemed to be regulated by the law of the place in which the acts were done, and, if the contracting parties are foreigners and belong to the same nationality, by their national law. The showing of a different intent is reserved in each case." This article applies also where the contract was entered into abroad between an Italian and a foreigner. Encyclopedie, Art. 9, Preliminary Dispositions, No. 173; Cass. Turin, June 30, 1882, Cass. Tor. 1882, 2, 215.

12. Art. 58 of the Commercial Code provides as follows: "The form and essential requisites of commercial obligations, the form of the acts that are necessary for the exercise and preservation of the rights arising from such obligations or from their performance, and the effect of the acts themselves, are governed, respectively, by the laws and usages of the place where the obligations are created and where said acts are done or performed, save in every case the exception laid down in article 9 of the Preliminary Dispositions of the Civil Code with respect to those subject to the same national law." To the effect that the domicile of the debtor controls see Trib. Rome, Dec. 30, 1871, La Legge 1872, 1, 156; App. Florence June 16, 1873, Annali, 1873, 2, 474.

13. In Germany the law of the place of performance governs the obligation of contracts and is applied also with reference to the statute of limitations. Reichsgericht, May 18, 1880, 2 RG 13; Jan. 17, 1882, 6 RG 24.

Art. 52 of the Convention on International Commercial Law concluded at the Congress of Montevideo provides that "the prescription of personal actions is governed by the law to which the corresponding obligations are subject."

14. *Don v. Lippmann* (1837, H. L.) 5 Cl. & F. 1; *Huber v. Steiner* (1835, C. P.) 2 Bing. N. Cas. 202; *Canadian Pac. R. Co. v. Johnston* (1894, C. C. A. 2d) 61 Fed. 738. See also Dicey, 710; Minor, 523; Story, 804; Westlake, 330; Wharton, 1256.

especially true in the United States where a statute creating a cause of action specifies the time within which such action must be brought. Such a provision is regarded as constituting a condition upon which the cause of action is granted and is controlled therefore by the law governing the substantive rights of the parties.¹⁵

In a good many of our states the common law rule that the statute of limitations is subject to the law of the forum has been changed by statutes, which under certain conditions close the doors of the courts of the forum with respect to foreign causes of action where the action is barred by such foreign law.¹⁶

The Italian decision referred to above reaches a result similar to the one produced by the statutes just mentioned. But for the fact that most of the American statutes contain various qualifications of the principle adopted by them, the result would be identical.

What is the true solution of the problem? That the law of the forum is free to apply either its own statute of limitations or the statute of the foreign state there can be, of course, no doubt. Whether it will apply the one or the other depends solely upon its own notion of what is right and proper. One of two viewpoints may be adopted. The question may be looked at in the first place from the viewpoint of the internal or uniterritorial law of the forum. This would lead in England and the United States to the application of the statute of limitations of the forum. Inasmuch as the ordinary statutes of limitation are regarded in this country for purposes of constitutional law, statutory construction, etc., generally speaking, as relating to the remedy and not to the obligation of the contract, the conclusion would be that the question must in the conflict of laws also be governed by the law of the forum, in accordance with the rule universally recognized that the *lex fori* controls the remedy.¹⁷ Logically the statute of limitations of the forum would govern without reference to whether the statute of the place governing the obligation of the contract was of a shorter or longer duration, or whether the foreign law regarded its statute of limitations as substantive or procedural. Most of the continental courts, on the other hand, would be forced to a different conclusion, because of the fact that "prescription of ac-

15. See *The Harrisburg* (1886) 119 U. S. 199; *Davis v. Mills* (1904) 194 U. S. 451. See also 46 L. R. A. (N. S.) 687, note.

16. See notes in 48 L. R. A. 639; 4 L. R. A. (N. S.) 1029; 51 L. R. A. (N. S.) 96, L. R. A. 1915C, 976; (1918) 27 YALE LAW JOURNAL, 1078.

17. Where the foreign statute of limitations operates as a discharge of the contract no action will upon principle be allowed anywhere.

tions" is regarded by their law as affecting the substance of the obligation.¹⁸

The second viewpoint may be called, in the language of the Supreme Court of the United States, the "international" point of view. In this case the reasoning would take the following form: As the contract was made in a foreign country it is just and wise to attach the same legal consequences to the operative facts as is done in such foreign state by its uniterritorial law. The same policy which dictates the incorporation of the foreign law of contracts suggests that the foreign statute of limitations be incorporated likewise. This rule is preferable to the doctrine which declines to incorporate foreign statutes of limitations, because it leads internationally to greater uniformity.

That this second mode of reasoning is more satisfactory than the first would seem to be clear, although it is opposed to the view taken by our own law. The Anglo-American doctrine admits of an easy historical explanation. When the question of the conflict of laws was first presented to English courts towards the middle of the eighteenth century, the common law had developed for centuries without foreign influence. It was most natural, therefore, that the courts should be inclined to restrict the operation of foreign law and look upon the statute of limitations in the conflict of laws as they were wont to do in their uniterritorial law—as affecting the remedy—especially since they could find warrant for so doing in the writings of the Dutch jurists. In regard to penal laws the same narrow attitude was originally taken by the English and American courts. Whenever a statute was penal in the municipal sense it was so regarded in the conflict of laws. Both the Privy Council¹⁹ and the Supreme Court of the United States,²⁰ however, realized in the end that a broader viewpoint should be taken in the conflict of laws, and that the law of the forum should decline to enforce such foreign laws only if they are penal in the strict or international sense.

There is no reason, as regards statutes of limitation, either, why the internal test, which classifies them as procedural or as relating to the remedy, should be carried over into the conflict of laws. A right which can be enforced no longer by an action at law is shorn of its most valuable attribute. After the enforce-

18. Concerning the nature of prescription from the viewpoint of international law, see Baudry-Lacantinerie & Tissier, *De la prescription* (3d ed.) 90-91; Sahm, *Die aussergerichtliche Geltendmachung der Verjährungseinrede*. 49 Iherings Jahrbücher, 59 ff.; Treutler, *Die Verjährungseinrede im internationalen Privatrecht, nach heutigem Reichsrecht*, 9 ff.

19. *Huntington v. Attrill* (P. C.) [1893] A. C. 150.

20. *Huntington v. Attrill* (1892) 146 U. S. 657.

ment of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere. Nor is there any policy pointing to a different conclusion.²¹ It follows that no court should enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties. The fact that either the internal law of the forum or the internal law of the foreign state or the internal law of both states may regard statutes of limitation as relating to the remedy is therefore immaterial. What attitude the foreign law may take in the conflict of laws with reference to statutes of limitation of other countries is likewise of no consequence, for the law of the forum should not upon correct principle incorporate the rules of the conflict of laws of another state.²²

Does it follow of necessity that the foreign statute of limitations must also be incorporated where the statute of the forum is the shorter in duration of the two? In the ordinary language of the courts the answer would be "yes, unless the enforcement of the foreign statute is contrary to the public policy of the forum." Upon a more correct analysis of the real situation this

21. Most of the foreign authors support the view that the law governing the obligation of the contract should control also the time within which an action on the contract is barred. Asser, *Eléments de droit international privé*, 84-85; Audinet, *Principes élémentaires du droit international privé* (2d ed.) 621; Cavaretta, *La prescrizione nel diritto internazionale privato*, 105-107; Despagnet, *Précis de droit international privé* (5th ed.) 999; 3 Diena, *Trattato di diritto commerciale internazionale*, 218, 223; Fedozzi, *Il diritto processuale civile internazionale*, 539; 2 Jitta, *La substance des obligations*, 165; 8 Laurent, *Le droit civil international*, 360-361; 4 Lyon-Caen & Renault, *Traité de droit commercial* (4th ed.) 571; 2 Meili, *Das internationale Civil- und Handelsrecht*, 356; Ottolenghi, *La cambiale nel diritto internazionale*, 487, 495; Savigny, *A treatise on the conflict of laws* (2d ed.) 201; Schäffner, *Entwicklung des internationalen Privatrechts*, 111; Villalbi, *Tratado de derecho mercantil internacional*, 422; Vincent & Penaud, *Effets de commerce*, No. 114; Wächter, *Archiv für die civilistische Praxis*, 411; 4 Weiss, *Traité de droit international privé* (2d ed.) 406-407, 463.

A few apply the law of the domicile of the debtor. Surville & Arthuys, *Cours élémentaire de droit international privé* (6th ed.) 937; 1 Vareilles-Sommières, *Synthèse de droit international privé*, 255.

The following authors prefer the law of the forum: Chrétien, *Etude sur la lettre de change*, 207; Labbé, S. 1869, 1, 49; Martin, *La prescription libératoire en droit international privé*, 19 *Revue de droit international et de législation comparée*, 279; Mittermaier, *Ueber die Collision der Processgesetze*, 13 *Archiv für civilistische Praxis*, 307.

Massé favors the law of the place of payment. 1 Massé, *Le droit commercial dans ses rapports avec le droit des gens et le droit civil*, No. 559.

22. See (1910) 10 COL. L. REV. 327, 344; (1918) 27 YALE LAW JOURNAL, 509.

statement means that the law of the forum may properly decline to incorporate the foreign statute of limitations, that is, attach identical consequences to the operative facts as are attached thereto by the foreign law, if some paramount interest of the forum would be injured thereby. Can it be said that the statute of limitations of the forum affects such an interest? Suppose that the foreign law had no statute of limitations at all or, what is more likely to be true in fact, that the period prescribed by the foreign law is 20 or 30 years, while that of the forum is 6 years, should the courts of the forum enforce the foreign cause of action after the expiration of 6 years from the time the action accrued? A proper appreciation of the situation would suggest a negative answer. The question affects not merely the parties to the litigation but the interests of the state as a whole. It relates directly to the administration of justice in the state.²³ A limitation of the time within which suit must be brought rests upon the impossibility of determining a case justly after the lapse of a long period since the time when the facts occurred. Because of the fallibility of human memory and the impracticability of preserving all written evidence concerning business transactions for an indefinite period of time, the law fixes a period which it deems reasonable under the conditions as they exist in the particular state or country. The length of the period granted is intimately connected with the system of procedure prevailing at the forum. For example, a state in which the procedure is oral will, in the nature of things, prescribe a shorter statute of limitations than a state which requires the facts to be established by written evidence. The period prescribed by the statute of limitations itself defines the maximum time within which, in the estimation of the legislature of that state, substantial justice can be done in the par-

23. The same view is held by a considerable number of writers. Aubry, 23 Clunet, 479; 1 Aubry & Rau, *Cours de droit civil français* (5th ed.) 165-166; Audinet, *Principes élémentaires du droit international privé* (2d ed.) 621; Baudry-Lacantinerie & Tissier, *Traité de la prescription*, Nos. 982, 985; Despagnet, *Précis de droit international privé* (5th ed.) 999; Valéry, *Manuel de droit international privé*, 1014-15; 4 Weiss, *Traité de droit international privé* (2d ed.) 407. According to Pillet the statute of limitations exists for the protection of the debtor, whose national law therefore should control. He would apply the statute of the forum, however, whenever it is of a shorter duration than the statute of limitations of the national law of the debtor. *Principes de droit international privé*, p. 457, note.

In *Leroy v. Crowninshield* (1820, C. C. Mass.) 2 Mason, 151, Fed. Cas. No. 8269, Story intimated that on principle no action should be allowed if all remedies were barred by the *lex loci contractus*, but he appears to have changed his view later. See *Townsend v. Jemison* (1850, U. S.) 9 How. 407; Story, *Conflict of Laws* (8th ed.), 793.

ticular case under the conditions surrounding the trial of such a case. This being the reason for the adoption of statutes of limitation, it follows as a matter of course that the maximum period prescribed must apply to all causes of action, irrespective of the place where they may have arisen. The result reached by the Italian court of appeal is therefore to be approved.

13. TORT LIABILITY AND THE CONFLICT OF LAWS*

THE existing English rules of the conflict of laws relating to torts were first clearly announced by the Judicial Committee of the Privy Council in *The Halley*,¹ decided in 1868, and by the Exchequer Chamber in the case of *Phillips v. Eyre*,² decided in 1870. In the former case suit was brought against *The Halley*, a British steamship, and her owners, on account of a collision in Belgian waters. The defendants set up the fact that the vessel was under the control of a compulsory pilot which would relieve the vessel or her owners of any responsibility for the collision. The plaintiffs pleaded in their reply that under Belgian law the owners of the vessel were liable for the damage done to the plaintiffs' vessel by collision, notwithstanding the fact that the vessel was being navigated at the time by a compulsory pilot. The learned judge in the court below allowed the reply on the ground that the law of the place where the collision occurred governs, but he was reversed by the Judicial Committee of the Privy Council. In rendering the opinion of the Court, Selwyn L.J. said: 'It is, their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of justice would enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.'³

In the case of *Phillips v. Eyre*, an action was brought against the Governor of Jamaica for false imprisonment. The defendant pleaded that the arrest was made in connexion with the suppression of a rebellion in the Island, and had been declared lawful subsequently by an act of the local legislature. The lower court gave judgment for the defendant, which was affirmed by the Exchequer Chamber. In the opinion rendered by the court, Willes J. summarized the English law as follows: 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the

* (1931) 47 LAW QUARTERLY REVIEW 483.

1. L. R. 2 P. C. 193.

2. L. R. 6 Q. B. 1.

3. L. R. 2 P. C. at 204.

act must not have been justifiable by the law of the place where it was done.'⁴

In support of the first proposition the learned Judge relied upon *The Halley*. The second proposition was based upon various earlier cases in which an action in tort or an indictment was disallowed on account of acts done in a foreign territory, or within foreign territorial waters, on the ground that such acts were not wrongful by the *lex loci*.⁵

The rule stated above has been approved by the English Courts ever since, for example, by the Probate Division in *The M. Moxham*,⁶ by the Court of Appeal in *Machado v. Fontes*,⁷ and by the House of Lords in *Carr v. Francis Times & Co.*⁸

In *Machado v. Fontes* an action was brought for a libel, alleged to have been published in Brazil. It was contended that the libel would give rise in Brazil only to a criminal prosecution, but not to an action for damages. The Court of Appeal held that as long as it was conceded that the libel constituted a crime under the law of Brazil, an action for damages could be maintained in England. Lopes L.J. concluded that *Phillips v. Eyre* and *The M. Moxham* had gone to the length of deciding that in order to constitute a good defense to an action in respect of an act done in a foreign country, and constituting a tort under the local English law, the act relied on must be one which was *innocent* in the country where it was committed. Rigby L.J. did not doubt that the change from 'actionable' in the first branch of the rule laid down by Willes J. in *Phillips v. Eyre* to 'justifiable' in the second branch was deliberate and meant that it must be innocent (justified or excused) by the *lex loci*. He added: 'It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be.

4. *Supra*, note 2, at 28-29.

5. The Court relied upon *Blad's Case* (1673) 3 Swan. 603; *Blad. v. Bamfield* (1674) 3 Swan. 604; *Dobree v. Napier* (1836) 2 Bing. N. C. 781, and *R. v. Lesley* (1860) Bell, C. C. 220; 29 L. J. (M. C.) 97. In *Mostyn v. Fabrigas* (1774) Cowp. 161, not cited by the learned Court, the Governor of Minorca was held liable for false imprisonment. In that case Lord Mansfield distinguished *Way v. Yally*, referred to in 6 Mod. 195, as follows: 'The Governor of Jamaica in that case . . . defended himself and possibly showed, by the laws of the country, an act of the assembly which justified the imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried' (at p. 175).

6. (1876) 1 P. D. 107.

7. [1897] 2 Q. B. 231.

8. [1902] A. C. 176. See also *Tomalin v. Pearson & Son* [1909] 2 K. B. 61 (C. A.) and *Walpole v. Canadian Northern Ry. Co.* [1923] A. C. 113, where the same rule was applied to claims under Workmen's Compensation Acts.

The remedy must be according to the law of the country which entertains the action.'⁹

In the light of the above discussion the English rules of the conflict of laws governing torts in general may be reduced to the following propositions:

1. The English Courts will not give an action for damages with respect to wrongful acts done in a foreign country unless they would be actionable if they had occurred in England.

2. The English Courts will not give an action on account of acts done in a foreign country, notwithstanding the fact that such acts would constitute a tort and give rise to an action as such if they occurred in England, unless such acts were 'wrongful' by the *lex loci*. No action will lie, therefore, if the act was 'innocent' or 'justifiable' by the *lex loci* at the outset, or if it was legitimized by a subsequent act of the Legislature or other duly constituted authority of the place where the act was done.

The foregoing summary raises fundamental questions in the conflict of laws. Perhaps the most important ones are those raised by *Machado v. Fontes* and by *The Halley*. According to *Machado v. Fontes*, it is not necessary that the act complained of give rise to an action for damages by the *lex loci delicti*. In the light of that case, it may be asked, therefore, what is the underlying theory of the English law relating to torts where the operative facts took place in a foreign country? Manifestly it is not the *obligatio* theory, which is sponsored by Mr. Justice Holmes of the Supreme Court of the United States.¹⁰

'The theory of the foreign suit,' says the distinguished Justice, 'is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent.'¹¹

The underlying conception of the *obligatio* theory is that the

9. *Supra*, note 7, at 235.

10. *Slater v. Mexican Nat. R. Co.* (1904) 194 U. S. 120.

11. *Supra*, note 10, at p. 126. And in *Western Union v. Brown*, (1914) 234 U. S. 542, the learned Justice states: 'Whatever variations of opinion and practice there may have been, it is established as the law of this Court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery' (at pp. 546, 547). See also Beale, *Treatise on the Conflict of Laws* (1916), 105; Sloovere, *The Local Law Theory and its Implications*, 41 Harv. L. Rev. (1928), 421.

claim asserted by the plaintiff is given to him by the foreign law, which has the exclusive power to create the right. If a claim has been created it must be recognized by the courts of other states as a fact. The latter control, of course, access to the local courts and the remedies that may be granted, but nothing else. It follows from this theory, that if the *lex loci delicti* does not confer any claim for damages upon plaintiff, there is nothing to enforce. Fundamentally opposed to this theory is *Machado v. Fontes*, for in that case the plaintiff recovered damages though he had no claim thereto under the Brazilian law. In other words, the English law as the *lex fori* created the right.

Judge Learned Hand, another eminent American judge, disagrees with Mr. Justice Holmes's conception of the conflict of laws. He says: 'When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. . . . However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.'¹²

In another case Judge Hand said: 'In the very nature of things, courts can enforce no obligations which are created elsewhere; when dealing with such obligations, they merely recognize them as the original of the copies which they themselves enforce.'¹³

According to this learned judge then, courts can only enforce rights created by the local sovereign. An English court can enforce only English rights. If the operative facts occur in Brazil, Brazil may or may not create a right under the circumstances of the case. If it does create a right, there is, of course, a Brazilian right. Nobody can change that fact. Before plaintiffs can recover, however, with respect to the facts occurring in Brazil, in an English court, the English law must create an English right, for only such do the English courts enforce. The creator of the right, so far as the English courts are concerned, is the English and not the Brazilian sovereign. The English courts, according to this theory, are not bound to recognize the Brazilian right; their power is not limited to the control of access to the English courts and to the remedy, if any, to be given. They have inherent power, not only with regard to the latter, but

12. *Guinness v. Miller*, 291 Fed. 769, at 770 (D. C. S. D. N. Y. 1923).

13. *The James M'Gee*, 300 Fed. 93, at 96 (D. C. S. D. N. Y. 1924).

with respect to the right itself. They may create a right identical with the local Brazilian right, or they may create a right different from that given by the Brazilian law. The latter alternative was chosen by the English law in the case of *Machado v. Fontes*.

If one looks at legal rights in a realistic way, that is to say, from the standpoint of the actual power and behaviour of courts or other governmental agencies entrusted with the enforcement of legal rights, the view advanced by Judge Learned Hand would appear to be more accurate than the *obligatio* theory of Mr. Justice Holmes.¹⁴ It is true courts talk a good deal about the enforcement of 'foreign' rights, but this may be nothing more than a convenient way of talking. After all, the ultimate power rests with the sovereign whose courts are invoked for the enforcement of the alleged right. The supporters of the *obligatio* theory have to admit this. They have to concede also that it is the *lex fori* which chooses the *lex loci delicti* as its rule of the conflict of laws with respect to torts. It might choose some other law, for example, the personal law or the local law of the forum. Again, if the operative facts take place in more than one state or country, the *lex fori* must decide whether the obligation to be 'enforced' shall be the *obligatio* of the one state or country, or of the other. For example, if suit is brought for wrongful death, and the actor was in state X, the injury was inflicted in state Y, and the death occurred in state Z, the law of the forum will have to decide whether it will look to the law of state X, Y, or Z in determining the rights of the parties. In other words, as long as independent sovereign states exist, with no superior to impose rules of the conflict of laws, in the very nature of things each must choose for itself the rules that appear most just and convenient.¹⁵

In deciding the case as it did, *Machado v. Fontes*, therefore, reached a conclusion which is entirely defensible from the standpoint of the fundamental theory of the conflict of laws. Except as bound by precedent, the Court of Appeal could lay down one of the following rules: (1) It could say that an action in tort could be brought if such action would lie if the facts had occurred in England. (2) It could say that an action would be

14. Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L. Journal (1924), 457; The Jurisdiction of Sovereign States and the Conflict of Laws, 31 Columbia L. Rev. (1931), 368; Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L. Journal (1924) 736; Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L. Journal (1928), 468; Stumberg, Conflict of Laws—Foreign Created Rights, 8 Texas Law Rev. (1930), 173.

15. Raape, in 6 Staudinger's Kommentar zum bürgerlichen Gesetzbuch (9th ed. 1931), 200.

granted if one was given by the *lex loci*. (3) It could combine the foregoing rules, or qualify them. For example, it might apply rule (1) only if the parties were British subjects or residents of England. It actually did hold that an English tort obligation would be created with respect to facts occurring in a foreign country, if such facts would give rise to a tort obligation if they had happened in England and the act was not 'justifiable' by the *lex loci*.¹⁶

If we inquire whether the position taken by the Court of Appeal in *Machado v. Fontes* is a desirable one, or whether some other conclusion might have been preferable, different views may be reasonably entertained. There was a time when it was felt that in the matter of foreign torts the *lex fori* should control exclusively, without reference to the law of the state where the operative facts took place. This was the view taken by Savigny¹⁷ and Wächter,¹⁸ and following them by a number of courts in Germany prior to the adoption of the present Civil Code.¹⁹ Laws relating to torts, like criminal statutes, being mandatory and binding upon all, the conclusion was drawn by Savigny that the local law of the forum must necessarily control as to foreign torts also.²⁰ Obviously, however, the conclusion drawn does not follow from the premise. It is true, of course, that in the present state of world organization, the courts of one country do not enforce the criminal laws of another. Courts will enforce only their own criminal laws, which, under exceptional circumstances, are extended to acts occurring in foreign countries, especially where the parties are citizens of the forum.²¹ Tort liability, on the other hand, is primarily designed to make good injury or loss caused to a person.

16. The *obligatio* theory is more rigid, and does not admit of the application of any other law than that of the *lex loci*. It affords only two modes of escape: (1) It may say that a matter is 'remedial' and therefore subject to the *lex fori*; (2) It may decline to enforce the foreign right by regarding its enforcement as contrary to the public policy of the forum.

17. Savigny, *Private International Law* (Guthrie's transl.), 205.

18. Über die Collision der Privatrechtsgesetze verschiedener Staaten, 25 Archiv für die civilistische Praxis (1842), 361, 389-397.

19. OT Stuttgart, June 25, 1856, 11 Seuffert's Archiv No. 3; OAG Dresden, Sept. 20, 1860, 14 Seuffert's Archiv No. 196; OLG Hamburg, Feb. 8, 1884, Hanseatische Gerichtszeitung, 1884, Hauptblatt, No. 50.

20. "This exception (*lex fori*) is further to be applied to the obligations arising from delicts, and that universally, since the laws relating to delicts are always to be reckoned among the coercitive, strictly positive statutes." Savigny, *op. cit. supra*, note 17, at 205.

21. H. Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), 58-77; 1 Travers, *Droit Pénal International* (1920), 63 *et seq.*; Liszt, *Lehrbuch des deutschen Strafrechts*, 130-131 (25th ed. by Prof. Schmidt, 1927).

Where the injury or loss occurred in a foreign country the question is whether, as in the case of contracts, it is not fairer to apply some other law than the local law of the forum. Tort claims being based upon wrongful conduct, it is generally felt to-day that the law of the state or country where such conduct has taken place should be applied. If the conduct is innocent according to the law of the state where the actor was at the time of the act complained of, or if it is privileged there, no claim for damages should be allowed against the actor on any other country. Were it otherwise, a person who is not a wrongdoer according to the *lex loci* could not leave the country without risk of being subjected to liability by virtue of the law of some other state which plaintiff might select for the purpose of bringing suit. This represents also the view of the English courts.

A special problem arises, however, as in the case of *Machado v. Fontes*, where the conduct is criminal under the *lex loci*, but does not give rise to an action for damages. This situation is not likely to occur where damage is done to property, for recovery will be allowed by the *lex loci* in that case as a matter of course. But it may arise in the case of a libel which does not affect the pecuniary interests of the injured party, for under the existing law of some countries such a libel constitutes only a penal offence. In this case the answer is not so simple. Should the forum create a right to damages in favour of the plaintiff when he has none under the law of the state where the libel was published? If not in general, should it do so where plaintiff and defendant are or have become citizens or residents of the forum? There are a few continental decisions which have extended the law of the forum on grounds of public policy to acts done in foreign countries, where such acts were not wrongful from the standpoint of the *lex loci*.²² These cases, however, were all cases of unfair competition in which the law of the forum was regarded as infringed by citizens or residents of the forum by means of acts done or caused to be done abroad. Some continental writers would go beyond the above cases and allow an action in other instances in accordance with the local law of the forum, especially where the parties are citizens of the forum.²³

Much may be said in favor of greater elasticity in the rules of the conflict of laws. Just what the qualifications to the *lex loci delicti* should be it is difficult to say. What is wanted are de-

22. *France*: App. Angers, Dec. 15, 1891, 19 Clunet 1144; *Germany*: RG, Oct. 2, 1886, 18 RG 28; June 16, 1903, 14 Niemeyer's Zeitschrift, 97; *Italy*: App. Milan, July 8, 1925, 53 Clunet 517.

23. 8 Laurent, Le Code Civil International (1881), 31; Pouillet, Manuel de Droit International Privé Belge (1928), 399; 1 Rolin, Principes du Droit International Privé (1897), 570; 3 Rolin, *op. cit.* 69.

cisions that appeal to one's sense of justice. If an English court feels that a person who has committed a crime in Brazil should respond in damages to the plaintiff, without regard to the nationality or residence of the parties, although he would not be so liable under Brazilian law, the writer for one would hesitate to brand the decision as erroneous. For is it real justice to allow a person to injure another by conduct which is criminal under the law of the place where he acts, and yet remain free from civil responsibility if none is imposed by the *lex loci*? Would the defendant, under such circumstances, have just ground for complaint if he is asked to make good the damage which he has caused? Again, if the law of the forum should create a right to damages in the above situation only if the parties are, or have become, citizens or residents of the forum, the writer would hesitate still longer before criticizing the conclusion. Except in extreme cases like the ones just discussed, it would seem unfair to hold a person by virtue of the *lex fori*, which is chosen by the plaintiff, if the latter has no cause of action under the *lex loci delicti*. While the decision in *Machado v. Fontes* may thus be justified, the arguments used in support of the conclusion are not beyond criticism. It was a case of first impression. All that had been decided in previous cases was that if the act was lawful or excusable by the *lex loci*, or was legitimized by a subsequent act of the legislature, the defendant would not be answerable in England, and that if the act was not lawful or excusable by the *lex loci* and had not been legitimized but gave rise to a tort claim by such law, an action would lie in England. It did not follow, however, that such action could be brought likewise if the *lex loci* made the act criminal but did not create a claim for damages. To say with Willes J. that 'it is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be,' is to assume without argument that no distinction exists in the conflict of laws between torts and crimes. And yet, so far as Anglo-American courts subscribe to the '*obligatio*' theory, a fundamental distinction must be made between those branches of the law, for according to this view, if no claim to damages arose under the law of Brazil, none could be created by an English court—a result diametrically opposed to that of *Machado v. Fontes*.

Assuming that before the *lex fori* will give a right of action on account of wrongful acts done abroad the *lex loci delicti* should ordinarily have created a right to damages, two questions arise which demand an answer: 1. What is to be understood by the *lex loci*? 2. What is meant by a 'delict' within the meaning of the rule? The English cases do not appear to have discussed these questions. In the United States there are de-

cisions relating to the first question, especially as regards personal injury and wrongful death claims. These are to the effect that the place of the wrong is not the place where the actor was, but the place where the injury or damage was done.²⁴ In the case of wrongful death the *lex loci* is not the law of the state where the death occurred but where the impact upon the body took place.²⁵ This conclusion is reached not only in states where the action for wrongful death is conceived of as the survival of the decedent's cause of action for personal injury, but also in those patterned after Lord Campbell's Act, where the legislation is deemed to have created a new cause of action. A vigorous protest against this conclusion has been made as regards the latter type of statute in connexion with the Federal Wrongful Death Act of 1920, relating to causes of action arising upon the high seas.²⁶ Some of the lower federal courts adopted this view and held that the cause of action under the Federal Wrongful Death Act arises only at the time of the death.²⁷ Others rejected this conclusion.²⁸ The Supreme Court of the United States has pronounced itself in favor of the latter view.^{28a}

The question what is meant by the *lex loci* where the operative facts have taken place in different States or countries has come before the German courts in a number of instances. In two cases, the Imperial Court held that the *lex loci* was the place where the actor was. Thus, where mining operations in one state caused wells in another state to dry up, the Court held that liability was to be governed by the law of the state in which the mining operations, and not where the effect of those opera-

24. *Great Southern R. Co. v. Carroll* (1892) 97 Ala. 126.

25. *Van Doren v. Pa. R. Co.* 93 Fed. 260 (C. C. A. 3d 1899); *Cameron v. Vandergriff* (1890) 53 Ark. 381; *De Harn v. Mex. Nat. R. Co.* (1893) 86 Tex. 68; *Rudiger v. Chicago, St. Paul, Minneapolis & Omaha R. Co.* (1896), 94 Wis. 191.

In Pennsylvania a special doctrine obtains, according to which the Pennsylvania Wrongful Death Act applies if the negligent act or omission and the death occurred in Pennsylvania, even if the injury occurred elsewhere. *Derr v. Lehigh Valley R. Co.* (1893) 158 Pa. 365; *Hoodmacher v. Lehigh Valley R. Co.* (1907) 218 Pa. 21; *Centofanti v. Pa. R. Co.* (1914) 244 Pa. 255.

26. Hughes, *Death Actions in Admiralty*, 31 Yale L. Journ. (1921), 115, 120.

27. To the effect that the *lex loci* is the place of death: *Ryley v. Philadelphia & R. Ry. Co.* 173 Fed. 839 (D. C. S. D. N. Y. 1909); *The Kaian Maru*, 2 Fed. (2d) 121 (D. C. Or. 1924); *Pickles v. Leyland & Co.* 10 Fed. (2d) 371 (D. C. Mass. 1925).

28. To the effect that the *lex loci* is the place of injury or impact: *The Anglo-Patagonian*, 235 Fed. 92 (C. C. A. 4th 1916); *The Chiswick*, 231 Fed. 452 (C. C. A. 5th 1916); *The Samnanger*, 298 Fed. 620 (D. C. S. D. Ga. 1924); *Liverani v. John T. Clark & Son* (1919) 176 N. Y. Supp. 725.

tions, had taken place.²⁹ In the second case, decided by the Court in 1891,³⁰ an order for attachment was made in Hamburg, which was executed against the plaintiff's property in Altona. The order was subsequently set aside, whereupon the plaintiff sought to recover damages against the defendant. Under the law of Hamburg the defendant was liable without proof of negligence, whereas negligence had to be proved by the law of Altona. The Imperial Court held that the lower Court was right in applying the law of Hamburg.

Torts committed by letter or through the press are deemed by the Imperial Court to have been committed in every state or country in which any of the operative facts occurred.³¹ In a late case³² the learned Court said: 'According to the established law, a delict is governed by the *lex loci delicti*, excepting Article 12 of the Introductory Act to the Civil Code (96 RG 96), the *locus delicti* being each place in which only a part of the operative facts took place. If the delict is caused by the sending of a writing from one place to another, the *loci delicti* are both the place

28a. Vancouver S. S. Co. v. Rice, (1933) 288 U. S. 445, 53 S. Ct. 420, 77 L. Ed. 885.

29. RG, Apr. 24, 1889, 44 Seuffert's Archiv No. 161; OLG Cologne, Apr. 21, 1914, 8 Zeitschrift für Völkerrecht und Bundesstaatsrecht, 437. 'The individuality of the mining operation,' said the Imperial Court, 'is not changed by the fact that damaging effects are connected therewith. As a result of such connexion, it is true, the claim for damages becomes concrete, but it is always the act as such which forms the basis of the obligation; the proposition that without damages there can be no claim for damages is of no significance for the reason that it applies likewise to ordinary delictual obligations, regarding which the law is settled that the governing law is not the law of the state where the damage occurred, but the law of the state where the actor was.' (44 Seuffert's Archiv No. 161, at 258, 259.)

30. RG, Apr. 20, 1891, 47 Seuffert's Archiv No. 3. In an earlier case the Imperial Court had applied the law of the place where the attachment took place. RG, Sept. 20, 1882, 7 RG 374. In the later case the learned Court argued as follows: 'Inasmuch as the execution of an order of attachment is always lawful and the necessary consequence of the order of attachment, if the latter is to have any practical significance at all, all the damages appear indirectly as consequences of the order of attachment. . . . Moreover, a uniform regulation of such liability is possible only on the condition that it is governed by the law of the place where the order is sought, rather than by the law of the place of execution, because the latter may occur in different places' (at p. 4).

31. RG, Nov. 20, 1888, 23 RG 305; Dec. 21, 1900, 56 Seuffert's Archiv No. 175; Dec. 22, 1902, 13 Niemeyer's Zeitschrift, 171; Nov. 8, 1906, 62 Seuffert's Archiv No. 150, also OAG Munich, March 16, 1847, 3 Seuffert's Archiv No. 295; OLG Hamburg, June 11, 1897, Hanseatische Gerichtszeitung, 1898, Beiblatt No. 146.

32. May 16, 1925, Das Recht, 1925, No. 1274. See also Cass. Zurich, March 16, 1912, 25 Niemeyer's Zeitschrift, 296; Swiss Federal Tribunal, Sept. 24, 1909, 8 Revue de Droit International Privé, 802.

from which it was sent and the place at which the writing was delivered to the person with reference to whom the wrongful act was committed. The same is true of communications by telephone and telegraph. Of the several laws the one that is most favorable to the party injured is to be applied (23 RG 305).'³³

The actual decisions do not make it clear what is meant by the law that is most favorable to the party injured. No difficulty arises where one law gives a cause of action and the other does not, but if the various laws give a cause of action, but differ in their provisions, it may become difficult, if not impossible, to say which is the most favorable to the party injured.

Most of the German writers on the Conflict of Laws do not agree with the position taken by the Imperial Court, nor do they accept the view accepted by the American courts.³⁴ They contend that where the act and its effect do not take place in the same state, the law of the former should determine not only whether the conduct was negligent, but also the consequences resulting therefrom. They emphasize the fact that if the wrongful conduct takes place in state X, the interests of that state are primarily in jeopardy. Not only so, but the actor is physically within the territorial limits of the state, whereas the effect of the act may be felt in various countries and may be lost in uncertainty. Moreover, the different systems of law do not agree as to what is meant by *the* effect of a given act in connexion with different classes of torts. On the other hand, the place where the actor was is readily ascertainable. Again, the *place* of the effect may depend upon accidental circumstances. For example, if a delict by letter is to be regarded as committed at the place where the addressee received the letter, obviously the place of the tort may be most uncertain. Suppose, for example, that the addressee is on a business trip and the letter is forwarded. It is admitted by these authors that the state in which the effect of the act takes place may, if it sees fit, protect itself against the same and hold the actor in accordance with its law, but this should be regarded merely as a measure of self-protection which should not affect the courts of other states.³⁵

33. Das Recht, 1925, at p. 404.

34. Kahn, Gesetzeskollisionen, 30 Ihering's Jahrbücher für die Dogmatik, 119; Neumeyer, Internationales Privatrecht, 32 (in Enzyklopädie der Rechts- und Staatswissenschaft, Abteilung Rechtswissenschaft, edited by Kohlrausch & Kaskel, 1923); Raape, *op. cit. supra*, note 15, 203; Walker, Internationales Privatrecht (4th ed. 1926), 459-462; 2 Zitelmann, Internationales Privatrecht (1912), 478-484; compare Bar, Private International Law (Gillespie's Transl. 1892), sect. 287. Some writers call attention to the fact that the *lex loci* may be determined differently with respect to torts and criminal law. Walker, *op. cit.* 459; 2 Zitelmann, *op. cit.* 479.

35. Walker, *op. cit. supra*, note 34, 461, 462; 2 Zitelmann, *op. cit. supra*, note 34, 481.

Some of the writers go part way with the Imperial Court. Habicht³⁶ would agree if the act was intentional or the actor indifferent to the consequences of his act. Professor Raape³⁷ would reach the same result as the Imperial Court where the tort is committed by letter, by telephone, or through the press—not because of the fact that the effect takes place in a different state, but because the actor is deemed to have committed the act not only in the state where he was physically present, but in the other state as well, for example, where he caused the letter to be delivered, the mail carrier being regarded as his agent. Raape would approve of the view of the Imperial Court also where the actor intentionally or recklessly causes an act which takes effect in an adjacent state. Thus if he intentionally or recklessly threw a stone at someone on the other side of the boundary line or incited his dog to bite him he would hold him liable in accordance with the law of either state. He would not extend the doctrine, however, to mere negligence.³⁸

Quaere: Would it not be fair to hold the actor, who is negligent according to the law of the state in which he is, liable for the damage caused by him in another state, though such act would not be wrongful by the law of the latter state?

The Restatement of the Conflict of Laws by the American Law Institute holds that the law of the place of the wrong, that is, where the injury or damage took place, will control.³⁹ It provides, however, that if by the law of such state the defendant is responsible for the consequences of negligent conduct, the question whether he was negligent should be determined with reference to the law of the place where he acted.

Difficulty arises also as regards the second question which was raised in connexion with the term *lex loci delicti*, namely, what is meant by 'delict' or 'tort.' If the *lex loci* regards such facts as belonging to the subject of torts whereas the law of the forum does not so regard them, it would seem clear that the *lex loci delicti* would not be applied by the Courts of the forum. A rule of the conflict of laws of the forum must be understood in the light of the general law of the forum, and a matter which is regarded by the latter as falling within the law of contracts, quasi-contracts or within the family law cannot be brought within the scope of the *lex loci delicti* of its conflict of laws even though it be 'qualified' as delictual by the *lex loci*. For example, if suit should be brought by an illegitimate child against the

36. Habicht, *Internationales Privatrecht* (1907), 95, 96.

37. Raape, *op. cit. supra*, note 15, at 204–206.

38. Raape, *op. cit. supra*, note 15, at 206, 207.

39. The American Law Institute, *Law of Conflict of Laws*, Restatement No. 4, sect. 421. See *Chicago, St. Louis & New Orleans R. Co. v. Doyle* (1883) 60 Miss. 977.

father for support in a country which regards the claim as one arising from the family law, it would not apply the *lex loci* of another state solely because the child was conceived and born in such country, and the claim is regarded as a delictual claim by the law of such country.

Although the *lex loci delicti* has reference only to factual situations which the law of the forum classifies as delictual, it should be sufficient for the application of the rule that this test be satisfied, without the additional requirement that the law of the forum create a cause of action under the particular facts of the case. For example, if A's servant commits a tort in state X under the law of which A is responsible for the act, the mere fact that suit is brought in state Y, where the master is not responsible as such for the acts of his servant, so that no action would lie against him if the acts had taken place in state Y, should not preclude recovery there.⁴⁰

The *lex loci delicti* applies to all questions of substantive law. As, for example, to the conditions required for the creation of a delictual claim, to capacity to commit a tort,⁴¹ to the effect of contributory negligence⁴² and to the measure of damages.⁴³ The assignment of a tort claim⁴⁴ and the question whether suit can be brought by or against the personal representative⁴⁵ are controlled by the same law. On the continent,⁴⁶ as well as in Latin American countries,⁴⁷ the *lex loci* would be applied also as regards the statute of limitations, which is deemed to belong

40. See Lewald, *Das deutsche Internationale Privatrecht* (1931), 266; Von Schelling, *Unerlaubte Handlungen*, 3 *Zeitschrift für ausländisches und internationales Privatrecht*, at 859; Raape, *op. cit. supra*, note 15, at 208; compare also *Batthyany v. Walford* (1887) 36 Ch. D. 269 (C. A.).

41. Raape, *op. cit. supra*, note 15, 197; Stauffer, *Das internationale Privatrecht der Schweiz* (1925), 16; Law of Poland of August 2, 1926, Art. 11, II.

42. *Caine v. St. Louis & S. F. Ry. Co.* (1923) 209 Ala. 181; *L. & N. Ry. Co. v. Whitlow's Admr* (1902) 114 Ky 470; *Fitzpatrick v. Int. Ry. Co.* (1929) 252 N. Y. 127; *Morisette v. Canadian Pac. R. Co.* (1904) 76 Vt. 267.

43. *Northern Pac. Ry. v. Babcock* (1893) 154 U. S. 190; *Slater v. Mex. Nat. R. Co.* (1904) 194 U. S. 120; *Comm. Fuel Co. v. McNeil* (1925) 103 Conn. 390; *L. & N. Ry. Co. v. Lynch* (1910) 137 Ky. 696; *Powell v. Great Northern Ry. Co.* (1907) 102 Minn. 448; *Hasbrouck v. N. Y. C. & H. R. Co.* (1911) 202 N. Y. 363; Raape, *op. cit. supra*, note 15, at 198.

44. Raape, *op. cit. supra*, note 15, at 199.

45. *Orr v. Ahern* (1928) 107 Conn. 174; *Hyde v. Wabash St. L. & Pac. R. Co.* (1883) 61 Ia. 441; *Needham, Admr v. Grand Trunk Ry. Co.* (1865) 38 Vt. 294; *Davis v. N. Y. & N. E. Ry. Co.* (1887) 143 Mass. 30; Raape, *op. cit. supra*, note 15, at 199.

46. ROHG, Oct. 17, 1874, 14 ROHG 258; RG, July 8, 1882, 9 RG 225; July 5, 1910, 74 RG 171; Nov. 21, 1910, 24 Niemeyer's *Zeitschrift*, 324.

47. Code Bustamante, Art. 229.

to the substantive right. The same would probably be held also concerning the question as to whether plaintiff is entitled to specific reparation.⁴⁸

The liability of a master for injury to a servant arising out of his employment is determined with reference to the *lex loci delicti*, that is, in the United States by the law of the place where the injury was received, no account being taken of the place of employment or the place where the negligent act occurred.⁴⁹ The ordinary rules of the conflict of laws applicable to personal injuries arising from the relation of master and servant are superseded to-day in the United States, however, to a very large extent by Workmen's Compensation Acts which prevail in all except a few States. In order to carry out the social objects for which they were enacted, these Acts have been interpreted in the United States, almost without exception,⁵⁰ as applying to injuries received without the state, provided the employer's business was carried on in part in the state and the contract of employment was made in the state. This attitude has been maintained even where the services of the employee were to be rendered exclusively in another state.⁵¹

The law governing the liability of persons not at fault, whether it be for injurious acts done by themselves, their servants, animals, or property, is governed in the United States in general by the *lex loci delicti*. That a master is responsible for the acts of his servant in accordance with the *lex loci delicti* is firmly established. In *Le Forest v. Tolman*⁵² it was assumed that a resident of Massachusetts was responsible for injury done by his dog in New Hampshire, in accordance with the New Hampshire law. Suppose, however, that A keeps a dog in state X and that under the law of state X, A is liable for injuries done by his dog only in case of negligence; that without negli-

48. Raape, *op. cit. supra*, note 15, at 198; 2 Zitelmann, *op. cit. supra*, note 34, 491.

49. *Alabama Great Southern R. Co. v. Carroll* (1892) 97 Ala. 126.

50. In one or two states the English view (see *supra*, note 8), denying extraterritorial effect to the Workmen's Compensation Acts, was adopted. *Re Gould* (1913) 215 Mass. 480; *Cogliano v. Ferguson* (1917) 228 Mass. 147; *Union Bridge Co. v. Industrial Commission* (1919) 287 Ill. 396. This view follows logically if the Workmen's Compensation Acts are regarded as modifying the rules governing torts at common law. The tort point of view has been abrogated recently in both states by statute. Mass. Acts, 1927, c. 309, ss. 13, 14; Ill. Laws, 1925, amending section 5 of Workmen's Compensation Act.

51. Dwan, *Workmen's Compensation Acts and the Conflict of Laws*, 11 Minnesota Law Rev. (1927), 329. See the cases collected in a note in 59 A. L. R. 735. Regarding the view of the French law, see 38 Yale L. Journ. 169, 170.

52. (1875) 117 Mass. 109.

gence on A's part the dog runs into state Y, where it causes damage to B, and that under the law of state Y the owner of such dog is liable without proof of negligence. Should B be allowed to recover against A? Or suppose that A keeps an automobile in state X and that under the law of state X, A is liable for injuries caused by his automobile only if he drives the auto himself, whereas under the law of state Y the owner of an auto is liable for injury done by the auto if it is driven by a member of his immediate family; that A's son takes the automobile without A's knowledge and drives it into state Y, where he injures B. Can B recover against A? In these cases A did not act himself in state Y, nor did he 'cause' any act to be done by the dog or his son in state Y. What law will be applied by the courts of the United States in these cases is uncertain.⁵³ Even if the courts of state Y should hold A in accordance with the laws of state Y as a measure of self-protection, it would not follow that the courts of state X or of some third state would impose liability.

Liability without fault on the part of the person sought to be held is regarded on the continent as 'quasi-delictual.' The law that should govern in these cases is not so well settled as in cases of pure tort. The trend of the later decisions and the majority of the writers apply the principles governing torts.⁵⁴

Although the courts will as a general rule look to the *lex loci delicti* to determine claims for damages arising out of torts, they will decline to do so under exceptional circumstances, namely, if to do so would violate the public policy of the forum. This exception to the rule prevails everywhere. It is a device which is used by the courts as an escape from the rigid operation of general rules which under particular circumstances lead to results which are shocking to the court. The public policy doctrine is retained even between the individual States of the United States, although in more recent times courts have shown a very liberal attitude, so that few,⁵⁵ if any,⁵⁶ modern

53. Restatement of the Conflict of Laws, No. 4, pp. 63, 64.

54. RG, June 14, 1915, Leipziger Zeitschrift, 1915, 1443, No. 16; 2 Meili, Das Internationale Civil- und Handelsrecht (1902), 94; Raape, *op. cit. supra*, note 15, 224. *Contra*: 2 Zitelmann, *op. cit. supra*, note 34, 543.

The *lex loci delicti* determines to-day the liability of the master for the acts of his servants. ROHG, Jan. 19, 1878, 23 ROHG 174; RG, Sept. 27, 1887, 19 RG 382; OLG Dresden, May 29, 1911, Sächsisches Archiv, 1912, 342. Formerly the matter was not infrequently referred to the *lex domicilii* of the master. OAG Darmstadt, Sept. 30, 1853, 9 Seuffert's Archiv No. 1. According to Bar, *op. cit. supra*, note 34, 639, the claim cannot go beyond the claim authorized both by the *lex loci* and the personal law of the defendant.

55. During the early years when the statutes for wrongful death were new in this country, courts sometimes declined to enforce causes of action

cases can be found where a court has declined to enforce a tort committed in a sister state, on the ground that such enforcement was contrary to the public policy of the forum. The German courts have declined to award damages against the owner of a vessel by virtue of the *lex loci delicti* in the case of a compulsory pilot,⁵⁷ or to apply the *lex loci* in the matter of prescription where the foreign law did not bar the cause of action by any statute of limitations.⁵⁸ In France the courts have refused on grounds of public policy to grant an action for a violation of a foreign bank monopoly, monopolistic principles being contrary to the French law,⁵⁹ or for a libel on account of documents used before a foreign court, such liability, if any, under the *lex loci delicti*, being contrary to the fundamental principles of the French law relating to the 'freedom of defence' in litigation.⁶⁰

In addition to the requirement that the enforcement of a foreign claim must not come into conflict with the public policy of the forum, there exist in some countries other conditions or qualifications which must be satisfied before an action on account of a foreign tort will prevail. Distrust of foreign law has been a characteristic of all courts and legislatures throughout the history of the conflict of laws. It exists to a considerable extent still to-day. In England it is manifest especially with regard to foreign torts. We find it in *The Halley*,⁶¹ which is responsible for the doctrine that the English courts will not enforce a foreign tort unless it would be actionable had the facts occurred in England. The Court might have placed its decision on the more limited ground, as was done by the German Imperial Court,⁶² that the enforcement of the particular claim against the owner of the vessel on account of the act of a compulsory pilot was so contrary to the English notions of justice, that it would not give effect to the foreign claim on grounds of public policy. The Judicial Committee of the Privy Council, however, used language to the effect that an English court would under no circumstances enforce a foreign delictual claim

arising in another state on the ground that such enforcement would be contrary to the public policy of the forum.

56. A recent California case, in which an action was brought against a father for a tort of his minor child, declined to enforce, on grounds of public policy, the law of the territory of Hawaii. *Hudson v. Von Hamm*, 259 Pac. 374 (District Ct. of Appeal, 1927; hearing denied by Supreme Court of California). The decision has met with much adverse comment.

57. RG, June 25, July 9, 1892, 29 RG 90.

58. RG, Sept. 29, 1927, 118 RG 141.

59. Cass. (Req.) May 29, 1894, S. 1894, 1, 481.

60. Trib. Civ. Seine, Jan. 2, 1899, 27 Clunet 777.

61. *Supra*, note 1.

62. *Supra*, note 57.

unless such claim could have been maintained in England if the facts had arisen there. And this view appears to have been adopted by the subsequent decisions in England. The English courts will enforce a foreign contract though it would not be actionable if it had been concluded in England.⁶³ A contract must be peculiarly objectionable before its enforcement will be denied in England on grounds of public policy.⁶⁴ In the matter of torts, however, the mere fact that the English law would not give an action is sufficient to preclude recovery.

The notion appears to be abroad and it is due probably to Wharton,⁶⁵ that the law of the United States accords with the English law in requiring that the local law of the forum shall regard the conduct as actionable, but that is incorrect. In a number of cases a foreign tort has been enforced when no action could have been maintained if the facts had taken place at the forum.⁶⁶ The question has arisen quite frequently in regard to contributory negligence which would have barred recovery under the local law of the forum.

The illiberal attitude manifested by the English courts does not obtain elsewhere except in China⁶⁷ and Japan.⁶⁸ By express enactment it is provided in these countries (1) that the act must be giving rise to an action in tort by the *lex loci* and must be unlawful also by the *lex fori*; (2) that the damages awarded cannot exceed those allowed by the local law of the forum.

Germany has a special provision in favor of German subjects, for Article 12 of the Introductory Act to the Civil Code provides that no greater claims can be asserted against a German subject than those constituted by German law. That Article 12 accepts by implication the *lex loci delicti* as the fundamental rule is conceded,⁶⁹ and the express qualification therein

63. *Re Bonacina* [1912] 2 Ch. 394 (C. A.).

64. See *Kaufman v. Gerson* [1904] 1 K. B. 591 (C. A.).

65. Wharton, *Conflict of Laws*, Sect. 478 (3d ed. 1905), p. 1093.

66. See, for example, *Morisette v. Canadian Pac. R. Co.* (1904) 76 Vt. 267.

67. Art. 25 of the *Règlement on the Application of Laws*, of Aug. 5, 1918, J. Escarra, *Droit International Privé de la Chine*, 6 *Répertoire de Droit International* (1930), Sect. 39.

68. Art. 11 *Ho-Rei* (Law Concerning the Application of Law in General), De Becker, *International Private Law of Japan*, 105, 106. De Becker says: 'Although the formation and effect of an obligation due to an unlawful act is, as a rule, governed by the law of the place of the act, such obligation is valid only in so far as such act is an unlawful one under Japanese law; and the damages involved can only be claimed in Japan within the limits and by the methods recognized by Japanese law.'

69. RG, Jan. 1, 1903; 13 *Niemeyer's Zeitschrift* 173; Nov. 8, 1906, 18 *Niemeyer's Zeitschrift* 159; March 12, 1906, *Juristische Wochenschrift*, 1906, 297; May 16, 1925, *Das Recht*, 1925, No. 1274.

contained has been adopted with reference to German subjects only. When a German subject is sued, therefore, on account of an alleged foreign tort, he will escape liability if the operative facts would not give rise to any claim against him according to local German law. Thus, if the defendant has no capacity to commit the tort by German law, or if delictual liability under German law does not exist in the absence of negligence or wilful conduct, or if his conduct would be justified under the rules of German law, for example on the ground of self-defence, no action could be maintained. If liability exists under German law, but is less extensive than that resulting from the foreign law, no greater rights can be accorded than those conferred by German law. Hence, if the claim is for punitive damages or for non-pecuniary damages in a case where German law does not allow them, the plaintiff would lose. Again, where the foreign statute of limitations is of longer duration than the German, no suit could be maintained after the period prescribed by the German statute has run. The question has arisen whether an action could be maintained against a German subject in Germany on account of a foreign delict giving rise at the same time to quasi-contractual liability when the delictual but not the quasi-contractual action is barred by the German statute of limitations.⁷⁰ The Imperial Court has held that an action for the foreign tort might be maintained in Germany under these circumstances, Article 12 not being confined to the claims which are torts under the German law, but referring to the law of Germany in general.⁷¹ Before the action is barred by virtue of Article 12 it must appear, therefore, that all claims on account of the foreign operative facts are barred by the German statutes of limitation.

How the qualification to the application of the *lex loci delicti* contained in Article 12 of the Introductory Act to the German Civil Code in favor of German subjects came to find a place in the Code is shrouded in obscurity.⁷² The German writers gen-

70. As stated above, note 46, the statute of limitations is regarded in Germany as relating to the substance; hence in the matter of torts the *lex loci delicti* controls, subject to Arts. 12 and 30 of the Introductory Act to the Civil Code.

71. RG, Sept. 29, 1927, 118 RG 141.

72. The qualification in favor of German subjects was contained neither in the original draft by Dr. Gebhard nor in the changes made therein by the Second Commission. For reasons undisclosed the earlier provisions were dropped by the Federal Council, Art. 12 having been substituted therefor. See Niemeyer, *Zur Vorgeschichte des Internationalen Privatrechts im deutschen bürgerlichen Gesetzbuch* (1915), pp. 6, 15; 1 Mugdan, *Die gesammten Materialien zum bürgerlichen Gesetzbuch für das deutsche Reich* (1899), 278, 279.

erally agree that all legitimate ends could have been attained under Article 30 of the Introductory Act, according to which the application of a foreign law is not permitted if the application would be *contra bonos mores*, or contrary to the object of a German law.⁷³

If the law of other countries is any standard by which the validity of the rules of the conflict of laws relating to torts can be tested, the conclusion is inevitable that so far as the English law requires for the enforcement of a foreign tort that it be actionable in all cases under the local English law, it is too severe. On the other hand, when it purports to create on the basis of foreign operative facts a right to damages by virtue of its own law, when the acts are not 'justifiable' by such foreign law, although no right to damages is given by the *lex loci*, it goes far in the opposite direction. The general trend of the law is in favor of the enforcement of a foreign tort if the right to damages is created by the *lex loci*, and then only, subject to the qualification that its enforcement will be denied if the discrepancy between the two systems of law on the point in issue is so great that the judge sitting at the forum regards such enforcement as unjust. However, as has been suggested above, a somewhat more flexible system than the one now prevailing, especially where the operative facts have taken place in more than one State, might answer better our modern conception of justice.

73. Lewald, *op. cit. supra*, note 40, 269; Raape, *op. cit. supra*, note 15, 209; Walker, *op. cit. supra*, note 34, 470; 2 Zitelmann, *op. cit. supra*, note 34, 505.

14. MARRIAGE BY PROXY AND THE CONFLICT OF LAWS*

I

THE question whether a marriage may be celebrated by proxy has been of very little practical importance in modern times. So far as England and America are concerned no mention is made of marriage by proxy in the books of the nineteenth and twentieth centuries. The only discussion of the subject in the English language that has come to the notice of the writer is found in Swinburne's "Law of Espousals" which was first published in the latter part of the seventeenth century.¹ The continental writers also, who are more inclined to discuss problems of a purely theoretical nature have paid little attention to the subject in recent times.² The legislation of the present war, however, has given to the subject renewed importance, for in three of the continental countries—Belgium, France, and Italy—marriage by proxy has been expressly sanctioned by law. The presence of so many American soldiers abroad naturally raises the question whether they may contract a marriage by proxy either by virtue of the American law or by virtue of the law of the country in which they may happen to be for the time being. Before an answer can be given to these questions the subject of marriage by proxy must be considered both from the standpoint of the internal law of the principal countries concerned and from the viewpoint of the American rules relating to the conflict of laws.

That marriage by proxy was allowed in the late Roman law and in the Canon Law is an established fact. Pomponius says:³

"Mulierem absenti per litteras eius vel per nuntium posse nubere placet, si in domum eius deduceretur: eam vero quae abesset ex litteris vel nuntio suo duci a marito non posse: deductione enim opus

* (1919) 32 HARVARD LAW REVIEW, 473.

1. The first edition appeared in 1686, the second in 1711.

2. 2 v. SCHERER, HANDBUCH DES KIRCHENRECHTS (page 192) gives the following bibliography: ARIENS, DE NUPTIIS, QUAE PER PROCURATOREM CONTRAHENTUR, Traj. 1841; Kutschker, E. R. 4, 321-46; LUDWIG, DE MATRIMONIO PRINCIPIS PER PROCURATORES, 1736; MÜLLER, DE MATRIMONIO ABSENTIUM, 1740; SANCHEZ, DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUM TOMI TRES, LII, Disp. 11; SCHÖFFER, DE MATRIMONIO PER SUBSTITUTUM CONTRACTO, 1709.

3. DIGEST, XXIII, 2, 5.

esse in mariti, non in uxoris domum, quasi in domicilium matrimonii."

According to this passage a man who was away from home might marry a woman by letter or messenger, but marriage could not be contracted in this manner by a woman who was absent from the man's place of residence. The reason for this difference between the man and the woman resulted from the requirement of the Roman law that the wife be led to the husband's home (*deductio in domum mariti*). Marriage was considered in the late Roman law as based solely upon the agreement of the parties to take each other from that moment as husband and wife.⁴ This consent might be expressed, with the reservation above made, by letter or by agent (*per nuntium vel epistulam*) as in all ordinary consensual contracts.

The Canon Law accepted as its fundamental doctrine the principle that *consensus facit nuptias*. Gratian⁵ insisted that there was no marriage unless the agreement of the parties to take each other as husband and wife was followed by cohabitation, but this requirement did not prevail. Peter Lombard, professor at the University of Paris, and later ordained bishop, suggested a distinction in this regard between *sponsalia de praesenti* and *sponsalia per verba de futuro*, requiring cohabitation only for the validity of the latter. Through the influence of Alexander III the church accepted this distinction toward the end of the twelfth and at the beginning of the thirteenth centuries.⁶ Parties declaring in words of the present tense that they take each other from that moment as husband and wife were regarded as legally married.⁷ The only difference between a marriage that was consummated through cohabitation and one that was not so consummated was that the latter might be dissolved by entering religion and was subject to the papal power of dispensation.⁸

From the earliest times the church had insisted that the parties should exchange matrimonial consents in face of the church and should get their union blessed by the church, but a failure to observe these requirements did not render the marriage void.⁹ At the Lateran Council of 1215 Pope Innocent III

4. NUPTIAS ENIM NON CONCUBITUS, SED CONSENSUS FACIT, D. 35, 1, 15; D. 50, 17, 30.

5. 1 ESMEIN, LE MARIAGE EN DROIT CANONIQUE, 109; 1 HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS, 386.

6. 1 ESMEIN, *supra*, 127.

7. 1 HOWARD, *supra*, 337; 3 BOEHMER, JUS ECCLESIASTICUM PROTESTANTUM, 3 ed., Bk. 4, Tit. 1, No. 13.

8. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 368; 1 ESMEIN, *supra*, 130.

9. 1 ESMEIN, *supra*, 96.

extended for the whole Western Christendom the requirement of the publication of banns. A marriage with banns had certain legal advantages over a marriage without banns; but the formless, unblessed marriage was nevertheless valid.¹⁰

Innocent III accepted the Roman view that the marriage contract, being based upon the present consent of the parties, might be entered into by messenger.¹¹ Some of the canonists, following the example of the Roman law, maintained that only the man should be permitted to marry in this manner,¹² but it was felt that the same rule should apply to both parties.¹³ Others contended that a marriage contract was different from an ordinary consensual contract, the expression of consent being of such far reaching consequences that it should be expressed in person instead of by proxy. This objection was met by the technical argument that a procurator represented the person of his principal and that the latter could pronounce the words through the procurator's mouth, as it were.¹⁴ This view triumphed and found expression in the following decretal of Boniface VIII:¹⁵

"Procurator non aliter censetur idoneus ad matrimonium contrahendum, quam si ad hoc mandatum habuerit speciale. Et quamvis alias is, qui constituitur ad negotia procurator, alium dare possit: in hoc tamen casu, propter magnum quod ex facto tam arduo posset periculum imminere, non poterit deputare alium, nisi hoc eidem specialiter sit commissum. Sane si procurator, antequam contraxerit, a domino fuerit revocatus, contractum postmodum matrimonium ab eodem, licet tam ipse quam ea, cum qua contraxerit, revocationem huiusmodi penitus ignorarent, nullius momenti existit, quum illius consensus defecerit, sine quo firmitatem habere nequevit."

Since the Council of Trent (1563) matrimonial consents must be exchanged according to the Canon Law before a priest and at least two witnesses. Otherwise the marriage is invalid. There appears to have been at first considerable dispute among the canonists on the point whether this new requirement af-

10. 2 POLLOCK AND MAITLAND, *supra*, 369; BROUWER, DE JURE CONNUBIUM, Bk. 1, Chap. 24, No. 19; FRIEDBERG, RECHT DER EHESCHLIESSUNG, 314; RICHTER, LEHRBUCH DES KATHOLISCHEN UND EVANGELISCHEN KIRCHENRECHTS, 1126, 1194; 2 v. SCHERER, HANDBUCH DES KIRCHENRECHTS, 163-64; WALTER, LEHRBUCH DES KIRCHENRECHTS, 572-73.

11. 1 ESMEIN, *supra*, 169-70.

12. Berardus would follow the Roman law on account of the weakness of the sex. 3 BERARDUS, COMMENTARIA IN JUS ECCLESIASTICUM UNIVERSUM, 156.

13. HOSTIENSIS, SUMMA AUREA, LIB. III, DE SPONS. ET MATRIMONIIS, Col. 1236, No. 7.

14. 1 Esmein, *supra*, 171.

15. SEXT. (LIBER SEXTUS DECRETALIUM), 1, 19, 9.

fecting the rules of the Canon Law relating to marriage by proxy. Some argued that the priest and the witnesses were to identify the parties and ascertain their intention to marry and that this necessitated the presence of both parties. This contention was rejected, it being held that the main object of the provision of the Council of Trent was to give publicity to the marriage, to bring the fact of marriage to the notice of the church.¹⁶ Thereupon some maintained that the power of attorney must be executed in the presence of a priest and two witnesses, but this view also did not prevail.¹⁷ The result was that even in those countries in which the Council of Trent was accepted a marriage conforming to the requirements of this Council might be entered into by proxy upon the same conditions, so far as the proxy is concerned, as before.¹⁸

The decretal above quoted requires that the mandate or power of attorney be special and that it has not been revoked before the celebration of the marriage.¹⁹ It mentions also the fact that in the absence of an express authorization the proxy shall have no power of substitution. No special form is prescribed for the power of attorney, so that a mere oral authorization would be sufficient.²⁰ The agent may be either a man or woman, no distinction being made between the sexes.²¹

The provisions of the Canon Law relating to marriage have generally been superseded on the continent to-day by civil marriage acts whose object it is, as their name indicates, to make marriage a purely civil institution. These acts aim to give due publicity to the proposed marriage and to make certain, so far as possible, that the marriage is the voluntary and deliberative act of the parties. Marriage by proxy obviously violates the objects of these acts, for there can be no certainty at the time of the marriage that the power of attorney was not given under

16. 5 FERRARIS, *PROMPTA BIBLIOTHECA CANONICA, JURIDICA, ETC.*, MATRIMONIUM, Articulus I, No. 34.

17. SANCHEZ, *DE SANCTO MATRIMONII SACRAMENTO DISPUTATIONUM TOMI TRES, DISPUTATIO*, 11, No. 23.

18. CARRIÈRE, *DE MATRIMONIO*, § 4. See also FRIEDBERG, *LEHRBUCH DES KIRCHENRECHTS*, 490; RICHTER, 1133; 2 v. SCHERER, *supra*, 192; v. SCHULTE, *LEHRBUCH DES KATHOLISCHEN UND EVANGELISCHEN KIRCHENRECHTS*, § 159; VAN ESPEN, *JUS ECCLESIASTICUM UNIVERSUM*, Pt. 2, § 1, Tit. 12, No. 10.

The canonists advise parties marrying by proxy to exchange matrimonial consents in person later. SANCHEZ, *supra*, No. 31, note.

19. As regards ordinary contracts the continental rule of agency allows the agent to bind the principal notwithstanding a revocation of the agent's authority if the contract was entered into before the agent knew of the revocation.

20. 2 v. SCHERER, *supra*, 192.

21. SANCHEZ, *supra*, No. 15.

circumstances constituting fraud, mistake or duress, or that it was not revoked prior to the celebration of the marriage.

The Code Napoléon does not prohibit marriage by proxy in express terms. Article 75 of the Code requires the officer of the civil status, however, to read to the parties the different documents required by law respecting their civil status and the Code provisions dealing with the mutual rights and duties of husband and wife. This requirement would be purposeless if the parties were not present in person. The framers of the Code²² without doubt intended to prohibit marriage by proxy and the provisions of the Code are so understood to-day.²³ The French writers maintain that in the absence of an express provision in the Code declaring a marriage by proxy void a marriage so celebrated before an officer of the civil status must be deemed valid.²⁴ The Court of Bastia has taken the contrary view.²⁵

In Belgium the Code Napoléon is law, so that the situation is the same as in France. The Belgian writers agree with the French that a marriage celebrated contrary to the implied prohibition of the Code would be valid.²⁶

Under the modern law of Italy marriage by proxy is prohibited except with respect to the King and members of the royal family.²⁷

22. At a meeting of the Council of State the first consul stated without being contradicted by any one "*le mariage n' a plus lieu qu' entre personnes présentes.*" 2 LOCRIÉ, *LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE*, 365.

The ancient law of France allowed marriage by proxy. This was still the law at the time of Pothier. 6 POTHIER, *OEUVRES*, 3 ed., No. 367.

23. 7 AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS*, 5 ed., § 466; 2 BAUDRY LACANTINERIE & HOUQUES-FOURCADE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES PERSONNES*, Vol. 2, No. 1597; 1 BEUDANT, *COURS DE DROIT CIVIL FRANÇAIS*, No. 222; 1 DEMANTE, *COURS ANALYTIQUE DE CODE CIVIL*, 3 ed., 357; 3 DEMOLOMBE, *COURS DE CODE NAPOLÉON*, No. 210; 1 DURANTON, *COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL*, No. 287; FUZIER-HERMAN, *CODES ANNOTÉS, CODE CIVIL*, Art. 36, Nos. 2 *et seq.*; Art. 75, No. 5; GLASSON, *DU CONSENTEMENT DES EPOUX AU MARIAGE*, No. 108; 1 HUC, *COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL*, No. 345; 2 LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS*, No. 427; 1 MARCADÉ, *EXPLICATION THÉORIQUE ET PRATIQUE DU CODE NAPOLÉON*, No. 231. *Contra*, MERLIN, *RÉPERTOIRE, MARIAGE*, Sec. 4, § 1, Art. 1, QUEST. 4; 1 TOULLIER, *DROIT CIVIL FRANÇAIS*, No. 574.

24. 7 AUBRY & RAU, *supra*, § 467; 3 DEMOLOMBE, *supra*, No. 210; GLASSON, *supra*, No. 109; 2 LAURENT, *supra*, No. 485.

25. BASTIA, April 2, 1849, D. 49, 2, 80; S. 49, 2, 338.

26. *ENCYCLOPÉDIE DE DROIT CIVIL BELGE*, 1 *CODE CIVIL*, Art. 36, No. 1, Art. 75, No. 6; 2 LAURENT, *supra*, No. 427; 1 THIRY, *COURS DE DROIT CIVIL*, No. 265.

27. See FOSCHINI, *I MOTIVI DEL CODICE CIVILE DEL REGNO D'ITALIA*, 171; 1 BORSARI, *COMMENTARIO DE CODICE CIVILE ITALIANO*, § 254; 1 CATTANEO, *IL CODICE CIVILE ITALIANO ANNOTATO*, 82.

A marriage cannot be celebrated in Germany by proxy since the law of February 6, 1875, section 52 of that law requiring the personal presence of both parties.²⁸ A reservation is made in favor of the ruling families and the princely House of Hohenzollern.²⁹ The present Civil Code made no change in the law.³⁰

In Austria the parties may marry by proxy with the consent of the government.³¹ The person with whom the marriage is to take place must be mentioned in the power of attorney. A marriage celebrated without "such special power of attorney" is void. Some of the Austrian writers maintain that the word "such" does not refer to the governmental consent and that the absence of such consent does not render the marriage invalid.³² Whether the power of attorney must be in writing is doubtful.³³

Belgium, France, and Italy have authorized marriage by proxy again during the present war. The Belgian law of May 30, 1916, provides that "during the duration of the war either or both of the parties may appear before the officer of the civil status either in person or by a special and authentic power of attorney."³⁴ According to Masson,³⁵ the law was passed for the benefit of Belgian soldiers residing abroad. The wording of the law gives it a general application.

The French law of April 4, 1915,³⁶ authorized soldiers and sailors with the colors to marry for grave reasons by proxy with the permission of the minister of justice and of the minis-

28. REICHSGESETZBLATT, 1875, 23. So formerly in Prussia, A. L. R. Pt. 2, Tit. 1, § 167; 3 DERNBURG, PREUSSISCHES PRIVATRECHT, 4 ed., 37.

29. § 72 of above law. The same reservation is contained in Arts. 32, 46, INTRODUCTORY LAW, CIVIL CODE.

30. A motion made before the second Code Commission to allow marriage by proxy when the bridegroom was in a non-European state was rejected. The need of such an exception did not appear sufficiently great, especially in view of the fact that since the law of May 4, 1870, Germans may marry abroad before a diplomatic or consular officer. 5 PROTOKOLLE, 51 *et seq.*; 2 ENDEMANN, LEHRBUCH DES BÜRGERLICHEN RECHTS, 8 and 9 ed., Pt. 2, 83; 4 PLANCK, BÜRGERLICHES GESETZBUCH, 3 ed., 4; 4 STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, 7 and 8 ed., 66.

31. Article 76, Civil Code. The consent will be given only if sufficient reasons appear. 1 NIPPEL, ERLÄUTERUNG DES ALLGEMEINEN BÜRGERLICHEN GESETZBUCHS DER OESTERREICHISCHEN MONARCHIE, 336.

32. 1 DOLLNER, HANDBUCH DES IN OESTERREICH GELTENDEN EHRECHTS, 308, 311-12; 5 STÄLIN, ZEITSCHRIFT FÜR KIRCHENRECHT, 158; 1 STUBENRAUCH, COMMENTAR ZUM OESTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH, 7 ed., 178. *Contra*, v. KIRCHSTETTER, COMMENTAR ZUM OESTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH, 5 ed., 88.

33. 1 STUBENRAUCH, *supra*, 77.

34. MASSON, LA LÉGISLATION DE GUERRE, London, 1917, 146.

35. *Ibid.*, 145.

36. DUVERGIER, LA LÉGISLATION COMPLÈTE DES LOIS, ETC., 1915, 113.

The law of August 19, 1915, has extended the benefit of the law of April 4 to French prisoners of war in Germany. CLUNET, 1916, 864.

ter of war or the minister of the navy. A circular of the minister of justice of April 8, 1915, defines more fully the object of the law and the particular steps to be followed.³⁷

Soldiers and sailors, employees of the Army and Navy, and persons in the service of the Army and Navy, were authorized in Italy to marry by proxy by a decree of June 24, 1915.³⁸

As for England, marriage by proxy is incompatible with the modern marriage acts.³⁹ The marriage act of 1898 prescribes that the parties must say in the presence of the registrar or authorized person and of the witnesses, "I call upon these persons here present to witness that I, AB, do take thee, CD, to be my lawful wedded wife [or husband]," or in lieu thereof the following words: "I, AB, do take thee, CD, to be my wedded wife [or husband]." These provisions evidently contemplate the personal presence of the parties and thus preclude the possibility of marrying by proxy.

With respect to this country the matter is not free from difficulty. In some of the states, in which the common-law marriage

37. DUVERGIER, *supra*, 1915, 119, 120.

As grave reasons the following are specified: (1) the existence of illegitimate children; (2) pregnancy; (3) imminent death of either party; (4) promise to marry before mobilization and service in a place dangerous to life.

The proxy must be at least twenty-one years of age and be of the male sex. He must not be a relative within the prohibited degrees of relationship, nor have been convicted of crime.

The power of attorney must be executed in accordance with the law of June 8, 1893, relating to acts of persons in the army.

For a criticism of the above provisions see Albert Wahl, "*Mariage par Procuration*," *REVUE TRIMESTRIELLE DE DROIT CIVIL*, 1915, 5.

38. 67 LA LEGGE (*Supplemento Legislativo*), Col. 511; CLUNET, 1917, 1172.

The power of attorney must be special and under penalty of nullity must indicate (1) the first and last name of the person giving the proxy; (2) the age and the place of birth of himself and of the person with whom he contemplates matrimony; (3) if he is a soldier, his rank and the regiment to which he belongs. The power of attorney must be executed in the presence of two witnesses, in conformity with article 2 of the decree of May 23, 1915. The marriage is valid notwithstanding a defect in the power of attorney at the expiration of six months after the husband has left the military service. 67 LA LEGGE (*Supplemento Legislativo*), Col. 511; CLUNET, 1917, 1172.

An agreement was entered into between the French and Italian governments according to which Italian soldiers may get married by proxy in France under the conditions prescribed by the Italian decree of June 24, 1915, and by way of reciprocity French soldiers may be married by proxy before the proper Italian officer of the civil status upon compliance with the provisions of the French law of April 4, 1915. See note of Minister of Justice, CLUNET, 1917, 1171.

39. MARRIAGE ACT, 1836, 6 & 7 WILL. IV, c. 85, § 20; MARRIAGE ACT, 1898, 61 & 62 VICT., c. 58, § 6.

is no longer recognized, the statutes manifestly require the personal presence of the parties. In other states the statutes are not so clear. In the great majority of states the common-law marriage is still valid, notwithstanding modern statutes relating to the solemnization of marriage.⁴⁰ Is not marriage by proxy valid in these states? The answer will depend in the first place upon the question whether marriage by proxy was recognized by the English law at the time our colonies were settled. On this point there can be little doubt. We need not inquire here whether the general Canon Law had force in England *proprio vigore* before the time of the Reformation or whether it required acceptance by the King's Ecclesiastical Law.⁴¹ As regards marriage by proxy we have the clearest proof that the Canon Law was so accepted in England, for we find in Lyndwood's *Provinciale*, written in 1430, which contains the accepted constitutions of the Church of England the following:⁴²

"Contractibus matrimonialibus qui non solum possunt fieri utraque parte præsente, sed altera absente ut videlicet contrahatur matrimonium per procuratorem, sicut legitur et notatur de procuracione c. ult. li. vi et in hoc casu requiritur mandatum speciale ut ibi dicitur: nec potest talis procurator alium substituere, ut ibi dicitur. Absque speciali mandato et si revocetur mandatum talis procuratoris etiam ipso ignorante re integra non tenebit contractus ut ibi dicitur. Ratio est quia deficit consensus mandantis et sic videtur quod ubicunque actus gesti per procuratorem debet adesse verus consensus Domini pro substantia actus non est necesse quod revocatio transeat in notitiam procuratoris."

The English law thus adopted the provisions of the Canon Law relative to marriage by proxy. No change was made in this respect by the Reformation. In the reign of Henry VIII the clergy was prohibited from enacting constitutions and ordinances without the King's consent, but the existing Canon Law was continued in force.⁴³ A revision of the Canon Law by a

40. The states are enumerated in L. R. A. 1915E, 19-20; ANN. CAS. 1912D, 598 ff.

41. In regard to this question see Maitland, "Canon Law in England," 11 ENG. HIST. REV., 446; OGLE, THE CANON LAW IN MEDIEVAL ENGLAND, London, 1912.

42. Bretton-Hopyl edition, 1505. Fol. CXLVIII.

43. 25 HEN. VIII, c. 19. The statute contains the following provision: "That such canons, constitutions, ordinances, and synodals provincial being already made, which be not contrariant or repugnant to the laws, statutes and customs of this realm, nor to the damage or hurt of the King's prerogative royal, shall now still be used and executed, as they were afore the making of this act, till such time as they be viewed, searched, or otherwise ordered or determined by the said two and thirty persons, or the more part of them, according to the tenor, form and effect of this present act."

commission of thirty-two members was contemplated by that statute but this revision was never consummated. Mary the Catholic⁴⁴ repealed the above law but it was reenacted under Elizabeth.⁴⁵ The statute of Henry VIII has remained the basis of English ecclesiastical law except in so far as the latter may have been changed by special legislation.

That marriage by proxy was a part of the English law until the eighteenth century would appear from Swinburne's treatise on *Espousals* in which he says:⁴⁶

"Not only such Persons as be present, but those Persons also which are absent may contract Spousals or Matrimony together. So did *Isaac* and *Rebecca*, as it appears in the Sacred Scriptures. Betwixt them that be absent, Spousals or Matrimony may be contracted three manner of ways; that is to say, by *Mediation* of their Proctors, or of *Messengers*, or of *Letters*; provided nevertheless in every of those Cases, that the Parties have some notice or intelligence the one of the other, at hand by *Fame* or *Report*; for unto those who be utterly *unknown* to us, we cannot yield our Consent, (without the which it is impossible to contract Matrimony or Spousals) no more than it is possible for us to love them, of whom we have never heard."

Swinburne thereupon enters upon a lengthy explanation of the subject, as regards the sufficiency of the power of attorney, the words to be used by the proxy, *et cetera*.

Did marriage by proxy become a part of the common law of this country? In the absence of decisions on the point no absolutely certain answer can be given to this question. In favor of the validity of marriage by proxy the following may be said. The American colonies are deemed to have brought with them the English law of marriage, so far as it was adapted to their environment. They accepted the then prevailing view that a marriage *de præsenti* without a religious ceremony constituted a perfect marriage, although the English House of Lords has since declared in the famous case of *Regina v. Millis*⁴⁷ that this has never been the English law. That such consent might be expressed by an agent was admitted by the Roman law, by the Canon Law, and, according to Swinburne, by the English law

44. 1 & 2 PH. & M., c. 8.

45. 1 ELIZ., c. 1.

46. SWINBURNE, *ESPOUSALS*, 2 ed., 162.

47. 10 CL. & F., 534 (1844). That the decision of the House of Lords is historically unsound, see 2 POLLOCK AND MAITLAND, *supra*, 367 *et seq.*; BISHOP, *MARRIAGE AND DIVORCE*, 5 ed., § 276 *et seq.*; FRIEDBERG, *LEHRBUCH DES KIRCHENRECHTS*, 309 *et seq.*; HOWARD, *supra*, 316.

Marriage based upon mere present consent came historically to an end in England through Lord Hardwick's Act of 1753, 26 GEO. II, c. 33. HAMMICK, *THE MARRIAGE LAW OF ENGLAND*, 2 ed., 13.

as late as the eighteenth century. If marriage by proxy did not become law in this country it must have been because it did not suit our conditions. A comparison of the conditions in England and in the American colonies would lead to the conclusion, however, that during our colonial days there existed stronger reasons for the recognition of marriage by proxy in this country than ever existed in England. Many a colonist must have left his sweetheart behind when he first ventured over seas. Others, without being engaged, must have desired, after becoming established in this country, to marry someone whom they had known in their native land. A trip to the old country for that purpose was long and costly. Unless marriage could be celebrated abroad by proxy the woman would be compelled to go to the man in a strange land and cross the seas unmarried. Marriage by proxy would enable the woman to become the man's wife before leaving her home.

Marriages by proxy have doubtless taken place in this country, but no record thereof can be found in the decisions of the courts.⁴⁸ That there are serious objections to marriage by proxy is apparent. The uncertainty in regard to the legal existence of such a marriage arising from the fact that the power of attorney is revocable and may have been revoked without knowledge of the other party or the proxy prior to the celebration of the marriage would suggest of itself the expediency of prohibiting such a marriage. In view of the fact, however, that marriage by proxy was permissible in England until the eighteenth century and has been recognized in all countries so long as marriage rested upon mere consent, it must be regarded as valid in those states in which the common-law marriage still exists. Should this view be taken by the courts it would follow logically that marriage might be contracted in such a state by proxy, although neither of the parties was present when the consents were exchanged by the proxies.

II

Turning from the internal law of marriage to marriage by proxy in its international aspects, it is apparent that the question relates to the formalities or to the mode in which the marriage must be celebrated. According to the generally accepted view a marriage is valid as regards the mode of celebration if it conforms to the law of the place of celebration.⁴⁹ In nearly all

48. According to a newspaper report a man in Chicago married recently a woman in Egypt by proxy.

49. *Belgium*: Brussels, May 29, 1852, Pas. 52, 2, 237. *England*: *Kent v. Burgess*, 11 Sim. 361 (1840); *Butler v. Freeman*, Ambl. 303 (1756);

countries, including the United States, the rule *lex loci celebrationis* has a mandatory character, so that a marriage not celebrated in accordance with its provisions is void.⁵⁰ In Italy the marriage is valid if it satisfies as regards form either the law of the place of celebration or the national law of the parties.⁵¹ Germany recognizes the same principle except that marriages celebrated in Germany must conform in respect of the mode of celebration to the German law of marriage.⁵²

From the standpoint of the conflict of laws of the United States the law of the place of celebration will decide, therefore, whether a marriage by proxy is valid. If the *lex loci celebrationis* allows this mode of celebration it will determine not only all the special questions relating to the power of attorney but also the formalities applicable to marriage in general. This law would decide, for example, whether the power of attorney must be in writing, whether governmental consent to such marriage is necessary, and the effect of a failure to obtain such consent. It will control the question whether a mere consent to take each other from the present moment as husband and wife is sufficient to constitute the parties husband and wife, or whether they must be joined in marriage by some official before witnesses and after the publication of bans, etc.

Marriage by proxy is possible under certain conditions in Austria, Belgium, France, and Italy, but it is evident that the legislation relating to marriage by proxy operates only as a waiver of the requirement of personal presence. In all other respects the local provisions relating to the celebration of marriage must be observed. These provisions are far more stringent than those prescribed by the statutes governing the marriage ceremony in this country. The ceremony itself can be performed only by an officer of the civil status, and one of the

DICEY, *CONFLICT OF LAWS*, 2 ed., rule 172; WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 5 ed., 60. *France*: App. Paris, Dec. 18, 1837, S. 1838, 2, 113; Trib. Civ. Seine, July 27, 1897, CLUNET, 1897, 1029. *United States*: See note 57 L. R. A., 155-59; STORY, *CONFLICT OF LAWS*, 8 ed., 216; 1 WHARTON, *CONFLICT OF LAWS*, 3 ed., 366 *et seq.*

The rule is applied in England and in this country although there has been an evasion of the local law. *Compton v. Bearcroft*, cited in *Middleton v. Janverin*, 2 Hagg. C. R. 444, note; *Simonin v. Mallac*, Sw. & Tr. 67 (1860). See also *Medway v. Needham*, 16 Mass. 157 (1819); *Sturgis v. Sturgis*, 51 Ore. 10, 93 Pac. 696 (1908); *State v. Hand*, 87 Neb. 189, 126 N. W. 1002 (1910); *Leefield v. Leefield*, 85 Ore. 287, 166 Pac. 953 (1917). *Contra*, *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N. E. 845 (1912).

50. BUZZATI, *L'AUTORITÀ DELLE LEGGI STRANIERE RELATIVE ALLA FORMA DEGLI ATTI CIVILI*, 187 *et seq.*

51. Article 9, Preliminary Dispositions, CIVIL CODE.

52. Article 13, Introductory Law, CIVIL CODE; 5 PLANCK, *BÜRGERLICHES GESETZBUCH*, 3 ed., 50.

parties must be domiciled in the place where the marriage is to be celebrated or have lived there for a specified period of time.⁵³ The parties must also submit various certificates relating to birth, parental consent, publication of bans, etc., before the marriage can be performed.⁵⁴ For an American it was very difficult, if not impossible, to satisfy these requirements. We have no registers of the civil status in this country; hence no official birth certificates as required by the foreign law can be obtained. Where no birth certificates can be presented the foreign law, it is true, provides a method for proving the time of birth, but such method is frequently of no avail to Americans. For example, Article 70 of the French Civil Code authorizes an *acte de notoriété* as a substitute for a birth certificate, but this involves a proceeding before a French court in which the facts relating to birth and parentage must be proved by seven witnesses.⁵⁵ In Italy the parties must be competent to marry each other not only under the national law but also according to the Italian law.⁵⁶ The capacity to marry according

53. Belgium, CIVIL CODE, Art. 74; France, Art. 4 of Law of June 21, 1907, repealing Art. 74, CIVIL CODE, DUVERGIER, 1907, 287; Italy, Art. 93, CIVIL CODE.

54. Belgium, CIVIL CODE, Arts. 63 *et seq.*, and Law of December 26, 1891. France, CIVIL CODE, Arts. 63 *et seq.*, and Law of June 21, 1907; DUVERGIER, 1907, 287; Italy, CIVIL CODE, Art. 79.

A certificate of capacity according to the national law was required in France by a circular of the Minister of Justice of March 14, 1831 (see S. 1836, 2, 342) but this requirement is no longer in force. According to a note of the Minister of Justice of August 1, 1911, the French officer of the civil status can no longer require of foreigners proof of their capacity to marry according to their national law. SURVILLE & ARTHUYS, DROIT INTERNATIONAL PRIVÉ, 6 ed., 373.

55. The practical impossibility of satisfying these requirements led in France to an arrangement between the Department of Justice and the American Embassy under which courts accepted a certificate based upon affidavits by an American attorney whose competency is certified to by the American Embassy, setting forth the circumstances of birth. See KELLY, THE FRENCH LAW OF MARRIAGE, MARRIAGE CONTRACTS AND DIVORCE, 2 ed., 63.

56. Article 102, Civil Code; App. Ancona, March 12, 1884, Foro Italiano, 1884, 1, 574.

Article 102 of the Civil Code reads as follows: "A foreigner's capacity to contract matrimony is governed by the law of the country to which he belongs.

"The foreigner is also subject to the impediments mentioned in Sec. 2, Chap. I, of the present title (Arts. 55 *et seq.*)."

Among the text-writers there is the greatest dispute concerning the meaning of Article 102. Most of them maintain that the foreigner must comply with the law of his own country and that of Italy. Emilio Bianchi, "*Studi di Diritto Internazionale Privato*," 10 ARCHIVIO GIURIDICO, 433; 9 DE FILIPPIS, CORSO COMPLETO DI DIRITTO CIVILE ITALIANO COMPARATO, 185-86; 1 LOMONACO, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, 316; 7

to the foreign law must be proved by an official certificate. As there is no American official who is authorized by law to execute such a certificate⁵⁷ an American can marry in Italy only if his capacity has been established in an Italian court.⁵⁸

An American, whether he be a soldier or a civilian, who can meet the above requirements will generally be able to be married in person, so that the foreign legislation on the subject of marriage by proxy is not likely to have great practical importance so far as the United States are concerned.

It is possible, of course, that an American soldier, while he was a prisoner in Germany or Austria, may have desired to marry by proxy a young lady to whom he had become engaged in Belgium, France, or Italy. Such a marriage could not take place in Germany because the German law does not recognize marriage by proxy. If the American were a prisoner in Austria the marriage could be celebrated there only with the permission of the government, and it is most improbable that such a consent could be obtained. Could the marriage be performed at the place of the residence of the fiancée in Belgium, France, or Italy? As the Belgian law of May 30, 1916, appears to have a general application it would seem as if such a marriage could be celebrated in Belgium. In regard to France and Italy there

PACIFICI-MAZZONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, 3 ed., 83; 1 RICCI, CORSO DI DIRITTO CIVILE, 2 ed., No. 260. But see 5 BIANCHI, CORSO DI CODICE CIVILE ITALIANO, 828; 1 BORSARI, COMMENTARIO DEL CODICE CIVILE ITALIANO, 382; ESPERSON, IL PRINCIPIO DI NAZIONALITÀ APPLICATO ALLE RELAZIONI CIVILI INTERNAZIONALI, 77-78.

According to some writers there is no general test, but each provision must be examined with a view of ascertaining whether it affects the public policy of Italy or only the private interests of the contracting parties. 2 FIORI, DIRITTO INTERNAZIONALE PRIVATO, 3 ed., Nos. 533-34; 2 GALDI, COMMENTARIO DI CODICE CIVILE, 597.

57. A marriage by an American was annulled in Italy a few years ago on the ground that the American consular agent who had executed such a certificate was not authorized by American law to do so. TRIB. CIV. DE ROME, June 19, 1911, *REVUE DE DROIT INTERNATIONAL PRIVÉ*, 1912, 493.

Continental countries regard the parental consent as relating to capacity and not to the formalities of marriage. App. Besançon, January 4, 1888, D. 89, 2, 69; App. Florence, August 7, 1907, *LA LEGGE*, 1907, 2230; AG Celle, January 15, 1870, 24 SEUFFERT'S ARCHIV, 1. The consent of parents was formerly regarded in France as relating to the formalities of the marriage. See decision of Parliament of Paris of June 26, 1634, given by 1 BOUHIER, *OBSERVATIONS SUR LA COUTUME DU DUCHÉ DE BOURGOGNE*, Chap. 28, 774.

58. Article 75, CIVIL CODE; 5 BIANCHI, *supra*, 833; 1 LOMONACO, DIRITTO CIVILE ITALIANO, 319.

Such a proceeding may be instituted upon a declaration from an American consul that the American authorities do not execute such certificates of capacity. BUZZATI, *LE DROIT INTERNATIONAL PRIVÉ D'APRÈS LES CONVENTIONS DE LA HAYE I, LE MARIAGE*, 279.

is doubt. The legislation of these countries applies to persons connected with the Army or Navy, and the question is whether it refers exclusively to the national Army and Navy. In the opinion of Professor Wahl ⁵⁹ the French legislation applies also to the Army and Navy of the Allies. If this view is correct the American prisoner in Germany could marry his fiancée in France, provided the French legislation is applicable to American soldiers and sailors who are prisoners in foreign countries.⁶⁰

Marriage by proxy, so far as American soldiers are concerned, would have a more practical bearing as regards marriages celebrated in this country. Many American soldiers must have been ordered abroad on such short notice that they were unable to get married before leaving. Suppose that one of these soldiers, feeling that the war might continue several years, should have asked a friend to act as his proxy in this country and that the marriage consents had been exchanged in his behalf with his fiancée in the state in which she lived. If the common-law marriage still existed in that state such marriage would probably be valid, as has been shown above. If the common-law marriage is not authorized in the state of her residence she might go to a neighboring state where it still exists and exchange marriage consents there with her fiancé's proxy. Such a marriage, if valid where celebrated, would be recognized by the other states of this country under the ordinary rules governing the conflict of laws. Even the courts of the home state whose law has been evaded would probably recognize the validity of the marriage. American courts have gone to the very extreme in sustaining marriages on grounds of policy, notwithstanding an evasion of the domestic law. As regards legal prohibitions to marry there is a conflict of view on the question, but there appear to be no modern cases in England or the United States which have refused to recognize, on the ground that there has been an evasion of the domestic law, a marriage validly celebrated in accordance with the law of the state where the marriage took place, where the difference in the law concerned merely matters of form. Inasmuch as the question whether a marriage may be entered into by proxy relates clearly to the formalities, a marriage so celebrated in conformity with the local law will be recognized, notwithstanding any evasion of the law of the state in which the parties were

59. Wahl, "*Mariage par Procuration*," REVUE TRIMESTRIELLE DE DROIT CIVIL, 1915, 15.

60. The provisions of the law of April 4, 1915, were extended, with respect to French prisoners in Germany, by the Law of August 19, 1915. CLUNET, 1916, 864.

domiciled.⁶¹ A logical application of the principle would enable the parties to get married in a state authorizing marriage by proxy without going there themselves, both parties being represented by proxies.⁶²

61. Upon the reasoning of the court in *Freeman's Appeal*, 68 Conn. 533, 37 Atl. 420 (1897), it might be argued that inasmuch as marriage by proxy is prohibited in the state in which the power of attorney was given the power of attorney itself is void, so that no marriage can be entered into anywhere by virtue of that power of attorney. The conclusion of the court in the above case as regards the validity of the power of attorney is, however, obviously erroneous, and there is no likelihood that any court would follow it with respect to marriage by proxy.

62. As this article was going through the press, the Judge Advocate General rendered an opinion in which he held that soldiers abroad might marry their sweethearts in the United States through interchanging a marriage contract by mail, provided that such marriage does not contravene state statutes, and that this method might properly be facilitated by the military authorities in France.

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15. POLYGAMY AND THE CONFLICT OF LAWS*

A MARRIAGE celebrated in the form prescribed by the law of the place of celebration is universally regarded as valid from the standpoint of the Conflict of Laws if the essential requisites for marriage are present.¹ As regards the law governing the essentials, there exists in the different countries great diversity of view.² According to the law of the United States such a marriage must conform to the law of the place of celebration.³ The conditions prevailing in this country, with its influx of foreigners, have caused this rule to be established in preference to the law of domicile or that of nationality, which prevails elsewhere.⁴ Our courts would apply this rule, it seems, not only to marriages celebrated in this country, but also to those celebrated abroad.⁵ Suppose, however, that a mar-

* (1923) 32 Yale Law Journal 471.

1. *United States*: Minor, *Conflict of Laws* (1901) 167; *England*: Dicey, *Conflict of Laws* (3d ed. 1922) 661; *France*: Civil Code, arts. 170, 171; *In re Montefusco*, Trib. Civ. Seine, Mch. 8, 1920 (1920) 47 Clunet, 206; *Germany*: Law of Introduction, Civil Code, arts. 11, 13; *Italy*: Prel. Disp. Civil Code, art. 9; *Brazil*: Intr. Civil Code, art. 11.

2. In England the law of domicile of the parties governs on principle, but if a marriage is celebrated in England between persons of whom the one has an English, and the other a foreign, domicile, it is not affected by any incapacity, which, though existing under the law of the foreign domicile, does not exist under English Law. Dicey, *op. cit. supra* note 1, 661, 683.

The continental countries generally apply the national law of the parties. *France*: Civ. Code, art. 3; *Germany*: Law of Intr. Civ. Code, art. 13; *Italy*: Civ. Code, art. 102; so also *Brazil*: Intr. Civ. Code, art. 8.

3. Minor, *op. cit. supra* note 1, sec. 73.

4. The same rule was adopted by the Convention of Montevideo. *Convention on International Civil Law*, art. 11.

5. Wharton, *Conflict of Laws* (3d Ed. 1905) sec. 165c. It is evident, however, that this rule cannot be applied without qualification to marriages celebrated in foreign countries. Suppose, for example, that two French people, domiciled in Switzerland, should get married in the latter country, that they have no "capacity" to marry under the local Swiss law, but that they are under no "incapacity" according to the local French law. Let us assume also that both the French and Swiss courts would determine the question with reference to the national law of the parties. It seems clear that our courts should recognize the validity of such a marriage, although it does not conform to the local law of the place of celebration. See Lorenzen, *The Renvoi Doctrine in the Conflict of Laws* (1918) 27 Yale Law Journal, 529, 530.

Suppose, again, that two American citizens, domiciled in this country, should get married in a country under the local law of which they have no

riage is contracted, in conformity with the local law, in a country allowing polygamy; would this marriage be recognized by the courts of this country? Anglo-American writers generally answer this question with an emphatic, No. They say that such a marriage is not a marriage as understood among the Christian nations and that its recognition would be opposed to sound public policy.⁶

Courts and writers are in the habit of ascribing the recognition of "foreign" law to some fundamental theory. The internationalists regard the rules of the Conflict of Laws as imposed upon each state by some system of International Law.⁷ The territorialists derive them from the "principle" of territoriality,⁸ invoking generally either the "comity" theory⁹ or that of "vested rights."¹⁰ The nationalists maintain that the rules are always prescribed by the sovereign state before whose tribunals the question in issue arises, with due regard to all the interests involved.¹¹ Whatever the particular theory followed, all recognize that effect will not be given to "foreign" law in so far as its application would conflict (1) with any prohibitory statute of the state in which the suit is brought; or (2) with the public policy of such state.

Much learning has been expended by continental jurists¹² in an attempt to elucidate the notion of "public policy" or "public order," which plays such an important part in the discussion of problems arising in the Conflict of Laws, yet nothing sub-

"capacity" to marry, but that they possess such "capacity" under the law of their domicil. Should not such a marriage be entitled to recognition? Such a result cannot be reached, however, without invoking the *lex domicilii*. If the rule of the Conflict of Laws of the state in which the marriage is celebrated should provide that the law of domicil or nationality controlled the "capacity" to marry, our courts might sustain it under the above conditions by resorting to the *renvoi* doctrine. But this doctrine is objectionable and can be usefully invoked only, as regards marriage, for the purpose of validating marriages, and not where it would operate to defeat them. See Lorenzen, *supra*, 530.

6. Minor, *op. cit. supra* note 1, sec. 75; Story, *Conflict of Laws* (8th ed. 1883) 188; Wharton *op. cit. supra* note 5, secs. 130, 131; Dicey, *op. cit. supra* note 1, 389; Foote, *Private International Jurisprudence* (4th ed. 1914) 98; Westlake, *Private International Law* (6th ed. 1922) 68, 69.

7. Beale, *Conflict of Laws* (1916) 86.

8. *Ibid.* 102.

9. *Ibid.* 100.

10. *Ibid.* 105.

11. Most of the German writers on the Conflict of Laws belong to this group.

12. See the literature given by Professor Beale, *op. cit. supra* note 7, 77, 78, note; also Fink, *Die Prinzipien des Internationalen Privatrechts und die Vorbehaltsklausel* (1914) 24 *Zeitschrift für Internationales Recht*, 138; Koster, *Public Policy in Private International Law* (1920) 29 *Yale Law Journal* 745.

stantial has been accomplished in this direction.¹³ The reason for this is not far to seek. Starting with the theory that the ordinary rules of the Conflict of Laws are imposed by International Law, as most of them did, the writers were compelled by practical considerations to find some theory by which to limit the operation of "foreign" law whenever its application was deemed inexpedient. In their eagerness to find a general doctrine in this regard they were not sufficiently mindful of the fact that the refusal to apply the "foreign" law depends upon a great variety of circumstances and largely upon the points of contract which the operative facts may have with the state in which the question comes up.¹⁴ In the very nature of things these elements cannot be reduced to a few simple and general propositions.

The territorialists also have started out with an *a priori* theory, namely, that the law of the state where the operative facts occur has the exclusive power to attach legal consequences to such facts.¹⁵ Like the internationalists they in turn were compelled to fall back upon the "public policy" argument whenever the law of the forum found it inconvenient to give effect

13. "No attempt to define the limits of that reservation (public order) has ever succeeded, even to the extent of making its nature clearer than by saying that it exists in favor of any stringent domestic policy, and that it is for the law of each country, whether speaking by the mouth of its legislature or by that of its judges, to determine what parts of its policy are stringent enough to require its being invoked." Westlake, *op. cit. supra* note 6, 51.

14. See Fink, *op. cit. supra*, note 12, 164; also Kahn, *Abhandlungen aus dem Internationalen Privatrecht*: 1: *Die Lehre vom Ordre Public* (1898) 39 Ihering's Jahrbücher für die Dogmatik 4.

The internationalists often speak of the application of the *lex rei sitae* governing the devolution or disposition of realty as an exception to the general rule that the personal law or that of the place of contracting controls. 3 Weiss, *Traité de droit international privé* (2d ed. 1912) 103.

In order to distinguish between those rules of public order which are not applicable to foreigners and those which are applicable to all, without regard to nationality, Brocher called the former, rules of "internal public order," and the latter, rules of "international public order." 1 Brocher, *Cours de droit international privé* (1882) sec. 44; see also 3 Weiss, *op. cit. supra* note 14, 77.

15. "The question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law of that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so." Beale, *What Law Governs the Validity of a Contract* (1910) 23 Harv. L. Rev. 270, 271.

to such "foreign" law. But if it be recognized that it is impossible in the Conflict of Laws to operate with *a priori* theories and that in the actual state of affairs each sovereign state has the power, with very slight exceptions, to attach any legal consequences it sees fit to any operative facts in the world,¹⁶ all problems in the Conflict of Laws reduce themselves in the last analysis to the question whether under a particular set of circumstances sound policy demands that the forum apply the local or some "foreign" rule of law.¹⁷

As regards marriage, our courts have said that under our conditions it is convenient to determine its validity according to the law of the place of celebration. In the case of foreign marriages also they appear to deem it expedient to apply the *lex loci celebrationis*.¹⁸ Under special circumstances, however, our courts hold that the policy of the forum requires the application of its own rules to the exclusion of all foreign rules. To this class of cases belong polygamous marriages. Will effect be denied to them by our courts under all circumstances? Although we are dealing here with an institution which is particularly repugnant to Christian people, it seems that our courts cannot completely ignore the fact that polygamy is a lawful institution among a large body of people on the face of the globe.¹⁹ Effect can properly be denied to such marriages only if their recognition would prejudice vital interests of the

16. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 Col. L. Rev. 269-279; Lorenzen, *Validity and the Effect of Contracts in the Conflict of Laws* (1921) 31 Yale Law Journal, 658-662. The power of the individual states in this country is limited, of course, by the federal constitution.

17. For purposes of discussion it may be convenient to refer to the law of the place of contracting, the law of the place of performance, the law of the domicile, etc., as the "general rules" governing in the Conflict of Laws and to say that these rules will not be applied in certain cases when their recognition or enforcement would violate the "public" policy or some "stringent" policy of the forum. This mode of speaking should not blind us to the fact, however, that both the so-called rule and the exception rest upon considerations of policy.

18. See *supra* note 5.

19. Kahn, one of the most acute writers on the subject of the Conflict of Laws, has made the following observations concerning this matter:

"None of our laws, however fundamental it may be, requires exclusive, absolute application. No foreign legal institution, however much we may disapprove of it, can be simply ignored by us. . . .

"If the point of contact is not intensive, and of relatively small importance as regards the particular legal relationship, even the laws which are of the most fundamental importance to the entire state, may yield in their application. On the other hand, if the point of contact is of greater intensity or of particular significance as regards the particular legal relationship, a law of little importance may perhaps not yield to the foreign law." Kahn, *op. cit. supra* note 14, 28, 73.

forum.²⁰ The extent to which such interests may be affected thereby will depend upon the circumstances.²¹ If, for example, a Turk should succeed in importing several wives into this country²² and seek to restrain them by virtue of the power vested in him by Turkish law or bring a suit based upon his Turkish marital rights, he would be told that he could exercise in this country such rights only as are accorded by our own law,²³ and that our law knows nothing of second and third wives. If he should seek a divorce here, even if he had taken unto himself only one wife in Turkey, our courts might agree with the Eng-

20. "Our rights are always confined to this, that we may treat as non-existent, cut off and put out of sight, those branches and offshoots only which come to light on our own territory. The trunk of the tree, which is rooted in a foreign system of law, is beyond our power, and if the branch or offshoot, which came into existence in this country, had no power to produce any mischievous results, if it could not come into conflict with our legal system, it would be wrong and unjust to destroy it, simply because the trunk from which it sprung could not be tolerated, if it had its roots in this country. For instance, polygamy cannot be suffered to exist in this country; but can we deny to the sons of a Mohammedan, who has lived after the law of his own country in polygamy, the right of property in a thing belonging to the father's succession which happens to be on our territory? Certainly not. Polygamy is in this case only the remote foundation of a claim, which in other respects does not come into conflict with our legal system; it is a condition precedent to the process for asserting that claim. Polygamy exists, and did exist in these foreigners' country, and the decisions of our judges cannot touch it. But if our system of law refused to recognize legal relations of the kind, which are illegal in this country, even as facts or conditions precedent to other legal claims, the final result of this view would simply be to throw intercourse with the foreign country in question into complete confusion, and in truth to do away with any settled intercourse." Bar, *Private International Law* (Gillespie's transl. 1892) 96.

21. Fink argues that the refusal to apply "foreign" law should never be based upon its content, but solely upon the point of contact with the state in which the suit is brought. Fink, *op. cit. supra* note 12, 164.

22. ". . . Polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy" are excluded from admission to the United States. Act of Feb. 5, 1917 (39 Stat. at L.) ch. 29, sec. 3.

23. Questions of individual liberty and power are considered in our law as matters of local police. Minor, *op. cit. supra* note 1, sec. 83. The continental writers also are agreed that if the second wife escaped, the husband would be unable to restrain her, and that she would be free to marry again, notwithstanding the fact that capacity in general is governed in continental countries today by the *lex patriae*. 2 Fiore, *Le droit international privé* (Antoine's transl. 1907) 87; 2 Fiore, *Delle Disposizioni Generali sulla Pubblicazione, Applicazione ed Interpretazione delle Leggi* (1908) 135, 136; 4 Laurent, *Le droit civil international* (1880) 533; Kahn, *op. cit. supra* note 14, 24; 6 Planck *Bürgerliches Recht* (8d ed. 1905) 116. An actual case arose some time ago in Italy, although it did not come before the courts, when one of the wives of the Ex-Khedive Ismail-Pasha, falling in love with a Neapolitan, escaped. The Ministry of Justice advised the officer of the civil status that the couple could be married. See Bar, *op. cit. supra* note 20, 97, note.

lish case of *Hyde v. Hyde*²⁴ and hold that our law of divorce cannot be applied to any marital relation arising in a country under the law of which the husband is authorized to take other wives.²⁵

Suppose, on the other hand, that the Turk never came to this country, that he inherited some property here and that the question is whether the property will go upon his death to his children born in Turkey of his several wives; would these children be recognized in this country as his legitimate children? The English case of *In re Bethell*,²⁶ adopting Lord Penzance's definition of a Christian marriage in *Hyde v. Hyde* as that of a "voluntary union for life of one man and one woman, to the exclusion of all others," reached the conclusion that the child of an Englishman, domiciled in England, born of a marriage contracted in South Africa with a woman of the Baralong tribe, which allowed polygamy, according to the customs of that tribe, was not legitimate, although the father had not taken another wife. This case must not be extended, however, beyond its facts. A different conclusion might have been reached, although the court does not dwell upon that fact, if Bethell had not been an Englishman, domiciled in England, but a member of the Baralong tribe.²⁷ The fact also, that Bethell

24. (1866) 1 Pr. & Div. 130. It is more likely that the American courts would take jurisdiction.

25. ". . . but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; . . . The inconsistencies that would flow from an attempt of this sort are startling enough . . . And as the power of enforcing the duties of marriage would thus be lost, so would the remedies for breach of marriage vows be unjust and unfit. For a prominent provision of the Divorce Act is that a woman whose husband commits adultery may obtain a judicial separation from him. And so utterly at variance with Christian marriage is the notion of permitting the man to marry a second woman that the Divorce Act goes further, and declares that if the husband is guilty of bigamy as well as adultery, it shall be a ground of divorce to the wife. A Mormon, therefore, who had according to the laws of his sect, and in entire accordance with the contract and understanding made with the first woman, gone through the same ceremony with a second, might find himself in the predicament, under the application of English law, of having no wife at all; for the first woman might obtain divorce on the ground of his bigamy and adultery, and the second might claim a decree declaring the second ceremony void, as he had a wife living at the time of its celebration: and all this without any act done with which he would be expected to reproach himself, or of which either woman would have the slightest right to complain." Lord Penzance, *ibid.* 136, 137.

26. (1887) 38 Ch. D. 220.

27. As the essentials for marriage are determined in English law on principle by the law of domicile the court might have invoked the English law on that ground, Bethell being domiciled in England at the time of his marriage.

declined to be married in church, that he had never introduced the Baralong woman to any European as his wife, and that he made special provision for the child in his will out of his property in Africa without mentioning the English property, satisfied the Court that he intended to contract a marriage in the Baralong sense, but not in the English sense. So far as the case may be deemed to lay down a general rule, it cannot be approved.²⁸ The court in *Hyde v. Hyde*, by whose decision Justice Stirling deemed himself bound in *In re Bethell*, was careful to limit the decision to the facts before it. Lord Penzance says in that case:²⁹ "This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions, may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."

In this country this question has arisen with respect to polygamous Indian marriages contracted in conformity with their tribal law. Not only have the children of the first wife been recognized as legitimate,³⁰ but those born of the second union as well.³¹

Questions may arise also with respect to the wives. Would the several wives of a Turk living in Turkey be entitled to dower in the real estate which the husband might acquire in this country? What rights of succession would they have upon his death in property left in this country? If he had taken only one wife in Turkey, what rights would his widow have under the above circumstances? A recent Iowa case, *Royal v. Cudahy Packing Co.* (1922) 190 N. W. 427, has answered these questions in part. In that case an action was brought under the Workmen's Compensation Act by an alleged widow of a de-

28. The great Belgium jurist, Laurent, goes very far in regarding such a marriage as non-existing, but feels nevertheless that the children born of a polygamous marriage in a country in which such a marriage is authorized should be allowed to inherit property in Christian countries. 4 Laurent, *op. cit. supra* note 23, 533. This conclusion is shared also by all the other continental writers. Bar, *op. cit. supra* note 20, 96; 2 Fiore *Le Droit International Privé* (1907) 87; 2 Fiore, *Delle Disposizioni* (1908) 134, 135; Kahn, *op. cit. supra* note 23, 25; Kühlenbeck, *Einführungsgesetz*, in 6 Staudinger, *Kommentar zum bürgerlichen Gesetzbuch* (7th & 8th ed. 1914) 150; Orescu, *Le mariage en droit international privé* (1908) 240; 6 Planck, *op. cit. supra* note 23, 116; 3 Weiss, *op. cit. supra* note 14, 488; 1 Zitelmann, *Internationales Privatrecht* (1914) 363.

29. *Supra* note 24.

30. *Wall v. Williamson* (1845) 8 Ala. 48.

31. *Kobogum v. Jackson Iron Co.* (1889) 76 Mich. 498, 43 N. W. 602.

ceased employee. The claimant had married the deceased in a Mohammedan country in accordance with the Mohammedan religion. Thereafter the deceased had come to this country, leaving his wife behind. Under the Mohammedan religion the deceased could marry four wives, but he had actually never contracted any marriage except with the plaintiff. It was urged, as in the *Bethell* case, that a marriage authorizing additional wives is not a marriage which the courts of Christian countries will recognize. The court held, however, to the contrary, in view of the fact that there was no evidence that it was the intention of the deceased to take other wives or that his wife intended that he should.

The continental writers have attempted to bring the cases arising from polygamy within their general theories concerning the application of "foreign" law and their notions of "public order," but no agreement exists in the results reached.³² Questions like the above cannot be determined by any general formula,³³ but demand a careful consideration of the facts of each particular case and of the conflicting policies involved, with a view of discovering whether the recognition of the "foreign" law can be brought into harmony with the legal order of the forum.

32. According to Planck, no action for the restitution of conjugal rights, or for support, should be allowed in Germany by the second wife, as long as the first marriage continues. The children of the second marriage born in Turkey prior to the dissolution of the first marriage should be regarded in Germany as legitimate, but as illegitimate if born in Germany. Property rights acquired by either party in Turkey by virtue of the matrimonial property law there in force should be respected. As regards property acquired in Germany by either party to the second marriage, the second marriage should be deemed non-existing. Planck, *op. cit. supra* note 23, 116.

Zitelmann would recognize a polygamous Turkish marriage if the parties remain in Turkey, or if the Turkish husband alone comes to Germany. If the second wife comes to Germany, or to any other country where monogamy prevails, her marriage should be deemed dissolved, but it should be allowed to revive upon her return to Turkey. As long as the first wife is in Turkey, she must be recognized as the only wife. The second wife, remaining in Turkey, should be unable in such case to bring an action for support in Germany, and a child born of her during this time in Turkey should be regarded as illegitimate in Germany. If both wives were in Germany the second marriage should revive upon the death of the first wife, provided the second wife had not remarried in the meanwhile, and her marital relations with her husband had continued in fact. Zitelmann, *op. cit. supra* note 28, 263-365.

33. See also the distinction between static and dynamic rights. Beale, *op. cit. supra* note 7, 165 *et seq.*

16. HADDOCK v. HADDOCK OVERRULED*

SUBJECT to diversified state legislation, divorce presents a particularly difficult conflict of laws problem in this country. The foundation for this problem was laid when divorces were granted for causes recognized by local legislation (*lex fori*) without reference to the laws of the matrimonial domicile. And the question was further complicated when married women were allowed to acquire domiciles separate from those of their husbands.¹ Since divorce strikes deep into our social life and is basically a religious or moral issue, state laws reflecting widely divergent views on the subject extend from extreme strictness to the greatest liberality. Causes for divorce range all the way from adultery as the sole ground to "extreme" mental cruelty. Consequently, persons living in states under whose laws they cannot obtain a divorce seek to take advantage of the laws of more liberal jurisdictions.

The migratory divorce problem has become even more intensified in recent times, for several states have changed their divorce legislation with the express purpose of attracting non-residents. Nevada, the first to enter the divorce business, reduced its residence requirement, in 1927, to three months and in 1931, to six weeks. Some of the Mexican states have gone even further, granting divorces without reference to domicile or residence, and in some cases by mail. All efforts to remedy the situation have failed.² Even the most conspicuous, the Uniform Marriage Annulment and Divorce Act, has received the

* (1943) 52 Yale Law Journal 341.

1. In England, a married woman cannot acquire a domicile separate from her husband even after judicial separation. Attorney General for Alberta v. Cook [1926] A. C. 444 (P. C.). Since the marriage *res* is, therefore, always at the husband's domicile, the difficulties arising from different domiciles are avoided. In countries determining status with reference to the national law of the parties rather than the law of their domicile (see note 4 *infra*), a wife can have a nationality different from that of her husband. Although this presents complications, the fact that it is more difficult to change nationality than domicile renders the problem of collusive divorce less common than in this country.

2. When the American Bar Association was formed in 1878, the migratory divorce problem was regarded as such an evil that one of the Association's immediate objects was to find a remedy for it. At the Association's fifth annual meeting its Committee on Jurisprudence and Law Reform presented a symposium of the law of the several states relating to divorce with reference to the possibility of securing greater uniformity in our legislation. See (1882) 5 A. B. A. REP. 283.

approval of only three states.³ An amendment to the Federal Constitution giving Congress power, similar to that of the Canadian and Australian legislatures, to deal with the subject of marriage and divorce is perhaps the only real solution to the problem.

I

Although state courts are generally agreed that the grounds for divorce are governed by the law of the forum,⁴ no agreement exists regarding the recognition of foreign divorces. Practically all courts have subscribed, at least in recent times,

3. Delaware, New Jersey, and Wisconsin.

4. The principal qualification to this statement is found in the law of the three states which have adopted the Uniform Marriage Annulment and Divorce Act. In these states a divorce will be granted to non-residents coming into the state after the cause of action arises only if the cause of action alleged was recognized as a ground for divorce in the jurisdiction in which the party resided at the time it arose.

Under the Hague Convention Relating to Divorce, of June 12, 1902, a divorce may be granted only if the national law of the parties and the *lex fori* allow divorce (Art. 1), and only for grounds recognized by both the national law and the *lex fori* (Art. 2).

Article 13 of the Convention of Montevideo on Civil Law provides that the matrimonial domicile shall determine whether the marriage can be dissolved, provided the ground for such dissolution is recognized by the law of the place where the marriage was celebrated.

Under the Bustamante Code, the right to separation and divorce is regulated by the law of the matrimonial domicile, but it cannot be founded on causes arising prior to the acquisition of such domicile unless they are authorized with equal effect by the personal law of both spouses (Art. 52). The causes for divorce and separation are subject to the law of the forum, if the spouses are domiciled there (Art. 54). Each contracting state has the power to recognize the divorce of persons obtained abroad for causes which are not admitted by their personal law (Art. 53).

In France, a divorce will be granted only if the national law of the parties at the time authorizes such divorce. App. Paris, January 30, 1908, 35 *Journal du Droit International Privé* 790 (1908). A divorce will be granted only upon grounds which are recognized both by the national law and French law. Trib. Civ. de Blois, May 10, 1906, 4 *Revue de Droit International Privé et de Droit Pénal International* 628 (1908).

In Germany, the national law of the husband at the time of divorce determines the grounds for obtaining a divorce (Intr. Law, Civ. Code, art. 17, ¶ 1). An act occurring when the husband possessed another nationality will be recognized as a ground for divorce only if it also constitutes a ground for divorce or judicial separation according to the law of such state (Intr. Law, Civ. Code, art. 17, ¶ 2). German law applies if at the time of the suit the husband has lost his German nationality, but the wife has retained hers (Intr. Law, Civ. Code, art. 17, ¶ 3). A divorce will not be granted in accordance with the national law when the cause is not recognized as a ground for divorce under German law (Intr. Law, Civ. Code, art. 17, ¶ 4).

to the status theory of divorce, though it has been said that New York has never fully adopted it.⁵ According to this theory there must be jurisdiction over the subject matter, the status, often called the *res*, which in Anglo-American law is determined by domicile. But conflicting views have arisen when only one of the parties is domiciled in the state of the forum. Many courts have concluded that in this situation the status or *res* is in both states and that under *Pennoyer v. Neff*⁶ a divorce granted in either state should be recognized if it satisfies due process requirements. The courts of one or two states have felt that this analogy to *in rem* proceedings should be qualified by requiring that the respondents have obtained actual knowledge of the pendency of the divorce proceedings.⁷ New York courts have taken the position that a divorce should not be recognized with respect to New York respondents who were not personally before the court. And in a number of cases the New York Court of Appeals has recognized foreign divorces without reference to domicile if the respondent appeared in the proceedings.⁸ According to a theory proposed by Professor Beale, if only one party is domiciled in the state granting the divorce, it should be recognized in a foreign state only when the other spouse has consented to the establishment of the domicile in the state or is precluded, because of fault, from objecting to the establishment of such domicile.⁹ The American

5. See Howe, *The Recognition of Foreign Divorce Decrees in New York State* (1940) 40 COL. L. REV. 373.

6. 95 U. S. 714 (1877).

7. See *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105 (1899). See also *Corkum v. Clark*, 263 Mass. 378, 161 N. E. 912 (1928); *Perkins v. Perkins*, 225 Mass. 82, 113 N. E. 841 (1916).

8. See *Glaser v. Glaser*, 276 N. Y. 296, 12 N. E. (2d) 305 (1938), *motion for reargument denied*, 277 N. Y. 652, 14 N. E. (2d) 205 (1938); *Ansorge v. Armour*, 267 N. Y. 492, 196 N. E. 546 (1935); *Gould v. Gould*, 235 N. Y. 14, 138 N. E. 490 (1923); *Guggenheim v. Wahl*, 203 N. Y. 390, 96 N. E. 726 (1911); *Kinnier v. Kinnier*, 45 N. Y. 535 (1871); *Tiedemann v. Tiedemann*, 172 App. Div. 819, 158 N. Y. Supp. 851 (1st Dep't 1916), *aff'd*, 225 N. Y. 709, 122 N. E. 892 (1919).

When the respondent is a domiciliary of some other state or country, the New York courts have declined to pass upon the question directly but have referred the matter to the law of the state in which the respondent was domiciled. *Dean v. Dean*, 241 N. Y. 240, 149 N. E. 844 (1925); *Ball v. Cross*, 231 N. Y. 329, 132 N. E. 106 (1921).

9. Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417. Professor Beale's theory rests upon the presupposition that the state as well as the individual parties have interests in the marital relationship, both of which must be before the court. In Anglo-American conflict of laws, the law of the state of the domicile controls status and for that reason the law of the state of the domicile of either spouse should be regarded as having jurisdiction over the subject matter in divorce proceedings. But, according to Professor Beale, the individual interest of the absent spouse

Law Institute has accepted this theory,¹⁰ and through its influence the doctrine has been adopted in at least one state.¹¹

Only a few decisions have been rendered by the United States Supreme Court on this controversial matter. Under its rulings, if at the time of the divorce neither party is domiciled in the state granting it, the decree, whether entered upon constructive service¹² or by a court with personal jurisdiction over both parties,¹³ is not entitled to full faith and credit. If, on the other hand, one spouse is domiciled in the state and there is personal jurisdiction over the other,¹⁴ or if the divorce is obtained upon constructive service at the matrimonial domicile,¹⁵ all other states must recognize the decree. It was held in *Haddock v. Haddock*¹⁶ that although one spouse was domiciled in the granting state, the decree was not entitled to full faith and credit if there was no personal jurisdiction over the other but merely constructive service.¹⁷

In the recent case of *Williams v. North Carolina*,¹⁸ the Supreme Court overruled *Haddock v. Haddock* and held that North Carolina must recognize a Nevada decree of divorce granted upon constructive service, it being assumed in the case that a bona fide domicile by one spouse had been acquired in Nevada. The Williams's and Hendrix's were both married in North Carolina and had been domiciled and made their home there for many years. Mr. Williams and Mrs. Hendrix went to Nevada and after six weeks' residence obtained divorces. They

should likewise be before the court, and in the absence of personal service or appearance, jurisdiction over his interest in the marriage relation can be had by constructive service only if he has consented to the establishment of the petitioner's domicile in the state or by his wrongdoing has forfeited the right to object to the establishment of such domicile.

10. RESTATEMENT, CONFLICT OF LAWS (1934) § 113.

11. See *Delanoy v. Delanoy*, 216 Cal. 27, 13 P. (2d) 719 (1932).

12. *Bell v. Bell*, 181 U. S. 175 (1901).

13. *Andrews v. Andrews*, 188 U. S. 14 (1903).

14. *Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869).

15. *Atherton v. Atherton*, 181 U. S. 155 (1901).

16. 201 U. S. 562 (1906).

17. There are only three other Supreme Court decisions concerning divorce. In *Maynard v. Hill*, 125 U. S. 190 (1888), the legislature of the Territory of Oregon was sustained in granting a divorce to a husband domiciled there, without notice to or knowledge of his wife whom he had wrongfully left; but the validity of the divorce under the full faith and credit clause was not determined. In *Davis v. Davis*, 305 U. S. 32 (1938), parties who had litigated the subject of domicile before the divorce court were held to be precluded on grounds of *res judicata* from relitigating the same issue in another state. And in *Thompson v. Thompson*, 226 U. S. 551 (1913), the doctrine of the *Atherton* case was extended to limited divorces.

18. 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, (1942).

then married in Nevada and returned to North Carolina, where they were convicted of bigamy. The Supreme Court of the United States, with two Justices dissenting, reversed the decision of the Supreme Court of North Carolina, which had upheld the conviction.

According to the majority opinion, written by Mr. Justice Douglas, the issue of domicile was not before the Court. The only question, therefore, was whether a divorce granted in Nevada upon constructive service to a person admittedly domiciled in the state could be denied recognition by North Carolina.¹⁹ Answering the question in the negative, the Court reasoned that a divorce proceeding is not in personam but involves status and is controlled by domicile, "at least when the defendant has neither been personally served nor entered an appearance."²⁰ Because Nevada had an interest in the institution of marriage, it could alter within its borders the marriage status of a spouse domiciled there, even though the other spouse was absent; and constructive service could be used with respect to the absent person provided its form and nature met the requirements of due process. Since the divorce decree was thus binding upon both spouses in Nevada, the majority concluded that it was entitled to full faith and credit in the courts of all other states.

Professor Beale's views,²¹ designed to restate the *Haddock* doctrine, were brushed aside, Mr. Justice Douglas stating that the power of the state of Nevada was not dependent upon an inquiry as to which party was at fault. "It is dependent," he said, "on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders."²² That compulsory recognition of this power

19. The Supreme Court was not concerned, therefore, with questions of estoppel which may preclude certain parties, especially those who have invoked the jurisdiction of the foreign divorce court, from subsequently denying the jurisdiction of the court. See Harper, *The Myth of the Void Divorce* (1935) 2 LAW & CONTEMP. PROB. 335 and *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158; Jacobs, *Attack on Decrees of Divorce* (1936) 34 MICH. L. REV. 749, 959. Nor was it concerned with the doctrine of *Davis v. Davis*, 305 U. S. 32 (1938), according to which parties who have litigated the question of domicile in a divorce proceeding may not, on principles of *res judicata*, later relitigate the issue.

20. 317 U. S. at 297. These words remind one of the position of the New York Court of Appeals, which has recognized foreign divorces when both parties were before the court, although neither party was domiciled in the state. Such a position cannot be reconciled, of course, with the status theory of divorce.

21. See note 9 *supra*.

22. 317 U. S. at 300. As Beale's theory makes fault a jurisdictional fact, which would permit the decree of divorce to be challenged on that ground in any state, it has met with little favor. See Bingham, *The Amer-*

would deprive North Carolina of its control over the status of its citizens and its policy regarding divorce was regarded as "part of the price of our federal system."²³ If the policy of North Carolina is infringed, it is sacrificed in support of the national policy, expressed in the full faith and credit clause, that judgments of sister states should find uniform recognition throughout the land. There were, furthermore, in the opinion of the majority intensely practical considerations requiring the nationwide recognition of divorce decrees altering the marital status of a state's domiciliaries; for it was felt that a contrary holding would do nothing less than bring "considerable disaster to innocent persons," "bastardize children hitherto supposed to be the children of lawful marriage," "or else encourage collusive divorces."²⁴

Unconvinced by the majority's reasons for overruling the *Haddock* case, Mr. Justice Jackson, in a strong dissenting opinion, attacked the concept of the marriage relation as a res which "follows a fugitive from matrimony into a state of easy divorce, although the other party to it remains at home where the res was contracted and where years of cohabitation would seem to give it local situs."²⁵ He deemed it inconsistent with our legal system that a person should be summoned by mail or publication to a remote jurisdiction "to submit marital rights to adjudication under a state policy at odds with that of the state under which the marriage was contracted and the matrimonial domicile was established."²⁶ In addition, he contended not only that the issue of domicile was before the Court, but also that no bona fide domicile had been acquired in Nevada, and that without such domicile the decree was not entitled to recognition by North Carolina under the full faith and credit

ican Law Institute v. The Supreme Court in Haddock v. Haddock (1936) 21 CORN. L. Q. 393; McClintock, *Fault As An Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564.

23. 317 U. S. at 302. In a separate concurring opinion, Mr. Justice Frankfurter even stated that North Carolina should not be allowed to impose its policy of divorce upon Nevada.

The Supreme Court in *Fauntleroy v. Lum*, 210 U. S. 230 (1908), had already held with respect to personal actions that the public policy of a state could not be invoked as a defense in an action upon the judgment of a sister state. The majority were of the opinion that this same principle should be extended to divorce proceedings in which the spouses have different domiciles and where there is a fundamental difference of policy between the states regarding the subject of divorce.

24. The first two quoted phrases are from Mr. Justice Holmes's dissenting opinion in *Haddock v. Haddock*, 201 U. S. 562, 628 (1906). The last phrase is from Mr. Justice Douglas's opinion, 317 U. S. at 301.

25. 317 U. S. at 316.

26. 317 U. S. at 317.

clause.²⁷ Mr. Justice Murphy, in a separate dissent, similarly questioned the Court's assumption of a bona fide domicile. Moreover, he maintained that the majority had introduced an undesirable rigidity into the application of the full faith and credit clause, since the interests of both Nevada and North Carolina in the marriage relations of their citizens were entitled to recognition.

II

Since all the Justices accepted the status theory of divorce, let us first consider the problem from that point of view. In the last analysis, the answer to the question whether North Carolina must recognize Nevada divorces depends upon whether the policy of North Carolina with respect to divorce should prevail or whether its interest in the status of its citizens (domiciliaries) should give way to the national policy in favor of the uniform operation throughout the country of judgments of sister states. As we have seen, the majority of the Court adopted the second view. Mr. Justice Murphy, on the other hand, felt that this attitude involved too rigid an application of the full faith and credit clause. He pointed out that the Supreme Court had held, in a series of cases relating to workmen's compensation acts,²⁸ that the courts of one state were not bound by the statutes of another, but were privileged to apply their own statutes if the state had a sufficient interest in the subject. None of these cases, however, involved the recognition of judgments of sister states, and so they manifestly have no direct bearing upon the divorce problem.²⁹

Mr. Justice Jackson's objection that it is inconsistent with our legal system that a spouse in one state who has continuing

27. Mr. Justice Jackson admitted that mere sojourn in Nevada might and probably would confer power upon the state "to free them and their spouses to take new spouses without incurring criminal penalties under Nevada law," and added that "the control of a state over property within its borders is so complete that I suppose that Nevada could effectively deal with it in the name of divorce as completely as in any other." 317 U. S. at 319.

28. See *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U. S. 532 (1935).

29. The workmen's compensation cases involved the full faith and credit clause with respect to "public acts" and not with respect to judicial proceedings. The question in *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U. S. 532 (1935) was whether the injured person could recover under the workmen's compensation act of the state in which he lived and in which he was employed or whether the courts of that state had to respect the workmen's compensation legislation of the state in which the person was injured.

rights there derived from the marriage relationship should be deprived of them upon constructive service by proceedings in a state having a different divorce policy goes, of course, to the very root of the whole question. His statement is based, no doubt, upon his conclusion that Williams and Mrs. Hendrix had not established a bona fide domicile in Nevada. On the assumption of the majority of the Court, however, that they were domiciled in the state, it seems clear that the Nevada spouses were entitled to have the marriage relationship controlled by Nevada law. The national policy expressed in the full faith and credit clause requires that the judicial decrees of sister states be recognized uniformly throughout the country. In deference to this national policy North Carolina would lose its control over the status of Hendrix and Mrs. Williams if they were personally before the Nevada Court.³⁰ And the same policy requires that the Nevada decrees should be respected when Hendrix and Mrs. Williams have been brought before the Nevada court by constructive service in accordance with the due process requirements which make these decrees valid in Nevada. For if constructive service is the only practical means by which Nevada can exercise its power to control the status of its own domiciliaries, jurisdiction under it is as "fair" for purposes of full faith and credit as that obtained by personal service. As the dissenting opinion in *Yarborough v. Yarborough*³¹ insisted, some flexibility may be proper in certain situations even under the full faith and credit clause applicable to judicial proceedings. But the propriety of extending it to the divorce situation seems doubtful.

In the *Haddock* case the husband had wrongfully left his New York wife and had acquired a domicile in Connecticut, the bona fide nature of which was not disputed. Thus Connecticut had power to dissolve his marriage bonds in Connecticut, and it seems sound policy, in the interest of uniformity, to require compulsory recognition of the divorce everywhere under the full faith and credit clause. The overruling of *Haddock v. Haddock* was therefore most desirable.

III

The problem becomes more complicated if we abandon the majority's assumption of a bona fide domicile in Nevada and face the facts in the *Williams* case as they actually existed. Williams and Mrs. Hendrix were married in North Carolina, were

30. See *Cheever v. Wilson*, 9 Wall. 108 (U. S. 1869).

31. 290 U. S. 202 (1933).

domiciled there and had lived there for many years. They went to Nevada for six weeks and, after obtaining their divorces, married and returned to North Carolina. Several different courses are open to the courts in dealing with such migratory divorces.³²

They may decline to recognize them by invoking a strict application of the status theory of divorce. In this event the courts would insist upon the acquisition of a bona fide domicile in Nevada in the sense in which the term "domicile" has heretofore been accepted in the Anglo-American conflict of laws, namely, the establishment of a permanent home.³³ Thus divorces granted to non-residents who go to Nevada for the sole purpose of obtaining divorces and have no intention of making a permanent home there would not be recognized in other states either under the compulsion of the full faith and credit clause or under the conflict of laws. If they leave Nevada shortly after obtaining their divorces, a presumption that they never intended to establish a bona fide domicile in the state would be in order.

The courts might subscribe to the status theory on principle and yet circumvent it by recognizing Nevada divorces obtained without the establishment of an actual bona fide domicile, in the sense of a permanent home, within the state. This device has frequently been used by courts which have thought that the recognition of migratory divorces is in the interest of sound national policy, but have not felt free to depart openly from the traditional status theory. These courts have preferred to close their eyes to the actualities of the situation and to allow juries to find the existence of a bona fide domicile in the state of divorce on technical grounds. For example, in many cases much weight has been accorded the Nevada divorce record, reciting as it does a finding of "residence" (in the sense of "domicile") in the state for the statutory period. The unrealistic character of this finding is indicated by well-known facts concerning Nevada divorces. In Nevada, the residence requirements for divorce have been reduced to six weeks; in order to give Nevada

32. French, German, and Italian writers on the conflict of laws have developed general theories regarding "fraud upon the law." See 1 ARMINJON, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ (2d ed. 1927) 226-262; NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVÉ (1928) 571 *et seq.*; Legeropoulo and Aulagueon, *Fraude à la Loi*, in 8 RÉPERTOIRE DE DROIT INTERNATIONAL (1930) 439-487, in which a bibliography of the extensive literature may be found.

33. In *In re Newcomb's Estate*, 192 N. Y. 238, 250, 84 N. E. 950 (1908) the court says: "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home."

divorces the color of regularity, the supreme court of that state, aware that domicile is required for interstate recognition of divorce, has held that the term "residence" in the statute means "domicile"; and trial courts, cooperating to the same end, require a person to declare that he intends to remain in Nevada permanently before granting him a divorce. Moreover, evidence of an intention to establish a domicile, such as opening a bank account or joining a political club, is manufactured on the advice of local counsel in a maneuver to establish a proper record. In this manner all the legal requirements for the interstate recognition of Nevada divorce decrees are technically satisfied.

Thus failure to distinguish between domicile in a local Nevada sense and domicile from the traditional standpoint of the conflict of laws and the full faith and credit clause has been a convenient means of circumventing the status theory of divorce.³⁴ But if courts come to the conclusion that migratory divorce decrees should be sustained, they should frankly invoke some other theory or combination of theories instead of continuing to render lip service to the status theory. It is an unbecoming spectacle for them to insist that domicile is the basis of jurisdiction in divorce and then to hold that a migratory Nevada divorce satisfies this requirement.

Before considering possible doctrinal bases for judicial recognition of migratory divorces, it may be of interest to examine the attitude of the courts towards migratory marriages. Marriage creates a status, and since status is determined by the law of domicile, it would seem that parties not allowed to marry under the law of their domicile should not be permitted to evade that law by having the ceremony performed in another jurisdiction and then immediately returning to their home state. And yet, instead of holding that such evasions constitute a fraud upon the law of the domicile, most courts have sustained these marriages,³⁵ feeling that the general interest of society in upholding marriages should outweigh local state policies.

34. For merely local or intrastate purposes, Nevada may call residence "domicile" if it cares to do so, or give a lesser meaning to the term "domicile" than it has in the conflict of laws and under the full faith and credit clause. But it cannot impose its definition of domicile upon other courts, especially the Supreme Court, when the validity of its judgments is attacked. For example, the Supreme Court allows constructive service in a personal action where the defendant is domiciled in the state. *Milliken v. Meyer*, 311 U. S. 457 (1940). If it should disallow constructive service on the basis of mere residence, the validity of the judgment would depend upon the existence of domicile as defined by the Supreme Court. The fact that residence and domicile had an identical meaning in the state would be immaterial.

35. See, for example, *In re Miller's Estate*, 239 Mich. 455, 214 N. W. 428 (1927).

This result has been accomplished by the simple expedient of dealing with marriage as a contract governed by the law of the place of contracting. There is, of course, a vast difference between an evasion of laws pertaining to marriage and an evasion of those pertaining to divorce; for while there is general agreement that marriage should be encouraged, there is a wide discrepancy of opinion regarding divorce. Assuming, however, that in view of the existing situation it is desirable to legalize migratory divorces, how can this be done by the courts consistently with legal doctrine?

New York Theory. Although during the last century the New York courts have made increasing use of the status theory of divorce, there is a line of cases³⁶ which recognizes foreign divorces without reference to domicile when the respondent has entered a general appearance. The author of a recent article³⁷ is of the opinion that these cases may eventually be explained in terms of estoppel; "or possibly the courts, under the pressure of a realistic jurisprudence, will someday acknowledge that in some circumstances the domicile of the parties is an irrelevant consideration."³⁸ The *Williams* case now compels the New York courts to recognize foreign divorces without personal jurisdiction over the respondent, if the petitioner had a bona fide domicile in the state of divorce; but the New York cases referred to above would go further and extend them recognition if the petitioner was a mere resident of the state of divorce and the respondent entered a general appearance. This view, however, solves the problem of migratory divorces only when the parties are agreed upon a divorce. If a juristic basis is to be found for the recognition of migratory divorces in general, particularly those obtained without the consent of the absent spouse, another theory must be advanced.

In Personam Theory. Ashley, Dean of the New York University Law School, has suggested that the status theory of divorce, requiring jurisdiction over the subject matter based on domicile, be abandoned in favor of the in personam theory, based solely on jurisdiction over the parties.³⁹ If this action were taken, jurisdiction over divorce would exist in any state chosen by the plaintiff, provided the defendant could be served in the state or entered a general appearance. Under the decision of the Supreme Court in *Milliken v. Meyer*,⁴⁰ suit could also

36. See note 8 *supra*.

37. Howe, *loc. cit. supra* note 5.

38. Howe, *op. cit. supra* note 5, at 403.

39. Ashley, *Conflict of Laws Upon the Subject of Marriage and Divorce* (1906) 15 YALE L. J. 387.

40. 311 U. S. 457 (1940).

be brought in the state of the defendant's domicile. Since judgments rendered in such suits would be entitled to full faith and credit and the defense of public policy would be unavailing in any state,⁴¹ this theory would have the undeniable merit of creating uniformity in the recognition of foreign divorces. If both parties were agreed upon a divorce, the suit could be brought in any state chosen by them; but if they were not agreed, the party desiring a divorce could bring suit only in a state in which the respondent could be personally served or was domiciled. This doctrine, therefore, would not legalize the migratory divorce if the defendant spouse were unwilling to cooperate by appearing in the suit. A logical extension of the theory would lead to the recognition of divorces by mail, now countenanced in some parts of Mexico. Because this doctrine would go beyond all reasonable bounds, a modification of the in personam theory, requiring the petitioner's personal presence within the state, would seem to be necessary.

Residence Theory. The residence theory appears to provide the most promising juristic basis for recognizing migratory divorces obtained without consent or cooperation of the absent spouse. If residence in a state, as distinguished from domicile, were sufficient to permit the use of constructive service upon the respondent, and thus to validate the divorce in all respects⁴² within the state, a jurisdictional basis for the uniform recognition of migratory divorces under the full faith and credit clause would be provided. The Supreme Court, in interpreting the Federal Constitution, may someday tell us whether residence can or should fulfill this function. But even if we assume that under the facts in the *Williams* case local state policies regarding divorce should yield to the national policy expressed in the full faith and credit clause, so that the question is reduced to one of fairness to the respondent, the residence theory still raises thorny problems. According to *Williams v. North Carolina* the petitioner's domicile in the state justifies constructive service upon the absent party. This, in effect, means that citing such a party before the divorce court by mere notification is deemed "fair." When, because of the petitioner's domicile, the state of divorce has power over the marriage status equal to that of the state of the absent party's domicile, it seems reasonable to permit it to exercise control over the marriage relation through constructive service, the only effective means available. When, on the other hand, the petitioner's connection with the state of divorce consists of a scant sixty-day residence, as in

41. See *Fauntleroy v. Lum*, 210 U. S. 230 (1908).

42. Mr. Justice Jackson, in his dissenting opinion in the *Williams* case, admitted that it would be valid today for some purposes. 317 U. S. at 319.

the *Williams* case, and the respondent has had his permanent home in another state for twenty years, the interest of the two states in the marriage relation is not equal and the fairness of constructive service is not so clear. Why should one state, solely by virtue of a petitioner's sixty-day residence there, be regarded as having the power to cite a domiciliary of another state before its courts by mere notification and to terminate, against his will, his interest in a marriage relation which was created by the law of that other state and is, because of his domicile there, still subject to that law? The answer might be that migratory divorces cannot be stopped by the refusal of other courts to recognize them; the consequences of these refusals lead to such socially undesirable results that a way must be found to legalize such divorces, and this can be done only by permitting constructive service.⁴³ This argument, however, would legalize all migratory divorces, even if the period of residence were reduced to thirty days or less; for the term "residence" has no technical meaning other than that given it by statute. The Supreme Court must, therefore, retain some degree of control over divorce legislation by requiring that residence extend over a reasonable period—say six months—in order to meet the due process requirements within the state of divorce and those of the full faith and credit clause in other states. On this condition only could residence, as such, become a proper and fair basis for jurisdiction in divorce.⁴⁴

Other theories have been used as a basis for divorce jurisdiction, but none of them is calculated to solve the migratory divorce problem. Thus jurisdiction might be based upon the fact that the marriage was celebrated within the state or that the marital offense was committed there.⁴⁵ In either case, if the defendant spouse were before the court, it might be impossible to successfully challenge the divorce decree for lack of due process in the state in which it was rendered. If the absent spouse were not before the court, constructive service could not be properly used; and if it were used, the decree would not only be invalid in the state in which it was rendered for failure to comply with

43. All attempts to seek relief through state legislation have been in vain, and an amendment to the Federal Constitution removing the subject of marriage and divorce from state control is as yet out of the question.

44. The same end could be attained, of course, by Congressional legislation under the full faith and credit clause defining "residence" for purposes of divorce. See COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) 90 and *The Power of Congress Under the Full Faith and Credit Clause* (1919) 28 *YALE L. J.* 421.

45. See Howe, *op. cit. supra* note 5, at 390-395.

the due process clause, but would not be entitled to recognition in other states under the full faith and credit clause.

IV

As long as individual states are deemed to have a paramount interest in the marriage relation of their citizens (domiciliaries) which should be protected against evasion, the status theory of divorce furnishes an accredited basis for a refusal to recognize the migratory divorce. Under this theory, only when a bona fide domicile, in the sense of a permanent home, has in fact been established in the state of divorce, will the demand for interstate uniformity require that a decree of divorce upon constructive service be recognized by all other states. In this situation the Supreme Court was fully justified in overruling the *Haddock* case and making such recognition mandatory under the full faith and credit clause. A bona fide domicile being a jurisdictional fact, its existence is subject to challenge before the courts of other states, notwithstanding a finding of "residence" or "domicile" upon the divorce record. If it appears from the facts that the petitioner left the state shortly after the decree of divorce was granted, a presumption might well be created that no bona fide intention to establish a permanent home existed. In this event the decree could be regarded by the courts of other states as invalid in the absence of clear and convincing evidence that at the time of the divorce proceedings the petitioner had a bona fide intention to make his permanent home in the state but was subsequently compelled by unforeseen circumstances to change his mind. Moreover, a party invoking the jurisdiction of a foreign court may be precluded from questioning it,⁴⁶ and if the parties to a foreign divorce proceeding actually litigate the

46. See note 19 *supra*. The question of estopping parties from questioning a divorce decree when they have appeared in the action, although neither spouse was domiciled in the state, was presented in the *Andrews* case. In the state court it was held that the estoppel doctrine could not be invoked against the appearing spouse in view of a Massachusetts statute expressly providing that a divorce should be of no force and effect in the state if an inhabitant went into another state to obtain it for a cause of action which occurred in Massachusetts while the parties resided there or for a cause which would not be authorized by Massachusetts law. *Andrews v. Andrews*, 176 Mass. 92, 57 N. E. 333 (1900). The Supreme Court affirmed the decision, holding that Massachusetts, as the domiciliary state, was not required by the full faith and credit clause to recognize the foreign decree by reason of an estoppel. *Andrews v. Andrews*, 188 U. S. 14 (1903). But there is nothing in the case to indicate that state courts may not apply the estoppel doctrine on grounds of comity.

question of domicile in the sense of a permanent home, it is *res judicata*.⁴⁷

Although the status theory of divorce may furnish in the abstract a satisfactory legal basis for the determination of the rights of individual states in the marriage relation of persons having different domiciles, its requirement of a bona fide domicile has not in fact prevented people from going to Nevada, in ever increasing numbers, without the slightest intention of making their permanent home in the state, and obtaining a divorce after a residence of six weeks. They have remarried and sent new offspring into the world. Although children born of void marriages are declared legitimate in most states by statute,⁴⁸ courts have regarded the consequences resulting from the invalidity of the migratory divorce as such a social evil that many of them have tried to sustain these marriages in one fashion or another. The foregoing analysis has revealed the extreme difficulty of finding a proper juristic basis for legalizing migratory divorces. The only theory which would validate such divorces upon constructive service is the residence theory. In view of the fact, however, that the term "residence" has no fixed meaning and may be reduced by legislation to a nominal period, it is not possible to accept this theory unless the Supreme Court is willing to insist that residence extend over a reasonable period and determine what is meant by "reasonable." The Supreme Court must ultimately decide when the use of constructive service can be regarded under our system of law as "fair" to the absent spouse and the state in which he is domiciled, so that the sacrifice of his interest in the marriage relation may be justified in view of the social benefits to be derived from the uniform operation throughout the land of divorce decrees of sister states.

47. See note 19 *supra*.

48. See 1 VERNIER, AMERICAN FAMILY LAWS (1931) § 48; 4 *id.* § 247.

17. EXTRATERRITORIAL DIVORCE— WILLIAMS v. NORTH CAROLINA II*

WILLIAMS v. *North Carolina I*¹ simplified the law on interstate divorce by compelling the recognition of foreign divorces if the petitioner was domiciled in the state granting the divorce, and without reference to which of the spouses was at fault. In doing so, it overruled the doctrine of the *Haddock* case,² according to which the domiciliary state of the respondent, who was not personally before the divorce court, need not recognize the foreign divorce. It also did away with the special doctrine laid down in *Atherton v. Atherton*,³ which made the recognition of the foreign decree upon substituted service compulsory if it was rendered by the courts of the last matrimonial domicil, that is, of the state in which the parties last lived together as husband and wife.

Williams v. North Carolina I was tried on the assumption that North Carolina had the power under the *Haddock* doctrine to attack the Nevada decree because the Nevada court had no personal jurisdiction over the respondent. For that reason it did not challenge the finding of the Nevada court that the petitioners had acquired a domicil in Nevada. The Supreme Court of the United States did not find it necessary, therefore, to discuss the subject of domicil as a prerequisite for divorce jurisdiction. The existence of domicil in Nevada became the decisive issue upon review by certiorari, in *Williams v. North Carolina II*,⁴ of the judgment of the Supreme Court of North Carolina which convicted the Nevada divorcees of bigamous cohabitation.⁵

* (1945) 54 Yale Law Journal 799.

1. *Williams v. North Carolina*, 317 U. S. 287 (1942). See Lorenzen, *Haddock v. Haddock Overruled* (1943) 52 YALE L. J. 341.

2. *Haddock v. Haddock*, 201 U. S. 562 (1906).

3. *Atherton v. Atherton*, 181 U. S. 155 (1901).

4. *Williams v. North Carolina II*, 325 U. S. 226, 65 Sup. Ct. 1092, 80 L. Ed. 1577, 157 A. L. R. 1366 (1945).

5. The charge to the jury by the trial court is summarized in the opinion of the Supreme Court as follows: "The trial court charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners 'to satisfy the trial jury, not beyond a reason-

The Supreme Court of the United States affirmed the convictions, with Mr. Justice Frankfurter speaking for a majority of six. "North Carolina," he says, "did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicile in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence."⁶

Mr. Justice Rutledge, dissenting, contended that domicile as a test for the recognition of judgments of sister states had been imported into the Constitution by the judges and had outlived its usefulness; that the decrees of divorce, being valid in Nevada, were entitled to full faith and credit in the courts of all sister states, but that, if *full* faith and credit were not to be accorded them, the constitutional policy should at least be approximated by not allowing a denial of full faith and credit by any standard of proof less than that generally required to overturn or disregard a judgment upon direct attack.⁷

Mr. Justice Black in a dissenting opinion, in which he was joined by Mr. Justice Douglas, charged the majority of the Court with having made domicile a purely federal question, whereas the full faith and credit clause of the Constitution and the supporting act of Congress had declared it to be a state question; he also criticized making domicile an indispensable requirement under the due process clause by regarding the Nevada divorce invalid in Nevada, and objected most vigorously to this latest expansion of federal power by adding a new content to the due process clause.

Approval of the decision in *Williams v. North Carolina II* depends in the first place upon one's personal reaction to divorce in general, and to migratory divorce in particular. If one does

able doubt nor by the greater weight of the evidence, but simply to satisfy' the jury from all the evidence that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that 'the recitation' of *bona fide* domicile in the Nevada decree was 'prima facie evidence' sufficient to warrant a finding of domicile in Nevada but not compelling 'such an inference.' If the jury found, as they were told, that petitioners had domicils in North Carolina and went to Nevada 'simply and solely for the purpose of obtaining' divorces, intending to return to North Carolina on obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury were instructed, was that place where a person has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite and unlimited length of time." 325 U. S. at 235.

6. *Id.* at 236.

7. *Id.* at 261.

not believe in "easy" divorce, one would readily concede that the Nevada divorce of North Carolinians after a six weeks' stay in Nevada is not entitled to recognition. On the other hand, if one feels that spouses should be allowed to terminate their marriage relationship when reasonable grounds for such desire exist and the divorce law of the state in which they live is very restrictive, one naturally sympathizes with their attempt to seek such divorce under the law of some state having a more liberal divorce policy.

Looked at solely from the standpoint of the individuals involved, without regard to state and national interests, the majority view seems very severe. We have here two persons convicted of bigamy and sent to prison because they took advantage of the divorce laws of a sister state, no doubt under the advice of counsel that the Nevada divorce would be recognized as valid in North Carolina. Acting upon that advice, they went to Nevada, stayed there the requisite time of six weeks, complied with the Nevada law in all respects, obtained their divorces, married each other in Nevada in conformity with Nevada law, and then returned to North Carolina as husband and wife. One would think, then, that the parties having obtained a divorce in a sister state through regular judicial proceedings, they were free to remarry in Nevada, and that having entered into a lawful marriage in Nevada, their status should be recognized everywhere in this country. To the observation that the Nevada divorce legislation was motivated by commercial and financial considerations,⁸ for the very purpose of attracting non-residents, the supporters of this view reply by calling attention to the fact that the six weeks' residence requirement is interpreted by the courts of Nevada as meaning domicil and that the establishment of such domicil has to be proved at the trial in Nevada before the divorce is granted. That being the case, the conclusion is drawn that Nevada has acquired with respect to the marital relations of the parties the interest formerly possessed by the State of North Carolina and still possessed by that state with reference to the other spouses.

Such argumentation is, however, largely fictitious. It has been estimated that 8,616 divorces were granted in Nevada in 1942 and 11,399 in 1943,⁹ the great majority of which must have been obtained by non-residents who went to Nevada solely for divorce purposes, remaining there only the required six weeks. All the while they contemplated returning to their home

8. In 1943 it is estimated that Nevada received more than \$500,000 in divorce fees. See RABEL, *THE CONFLICT OF LAWS—A COMPARATIVE STUDY* (1945) 394, n. 18.

9. *Ibid.*

states immediately after their divorces were secured, yet they all swore falsely that they intended to make Nevada their permanent home, having been warned by local counsel that, unless they did so, they would be out of court. On advice of counsel they also took steps which would be accepted by the Nevada courts as corroborating their sworn statement but were actually nothing more than sham and camouflage. Upon such evidence the courts find that they acquired a Nevada domicil.

The naked fact in these migratory divorce cases is that no bona fide domicil is established in Nevada. The same was true in *Williams v. North Carolina II*. That being the case, and in the absence of other bases for the jurisdiction of the Nevada courts, a divorce decree in such circumstances appears more like an interference by Nevada in the marital relations of North Carolinians than, as Justice Black claims, an unwarranted assumption of power on the part of North Carolina "to regulate marriages within Nevada's territorial boundaries."¹⁰ However, the harshness of the result in such cases, leading to conviction of bigamy and bastardization of later offspring might lead one to sympathize with the minority of the Supreme Court for their efforts to find ways and means to reverse the judgment of the Supreme Court of North Carolina. They point out that, the existence of domicil having been found by the divorce court in Nevada and recited upon the record, the burden of disproving the establishment of a Nevada domicil should have been upon the State of North Carolina,¹¹ and that the charge to the jury had failed to impose such burden.¹²

According to Mr. Justice Black the judgment might have been reversed also on the ground that under the particular circumstances of the case North Carolina had no longer a sufficient interest in the marital relation to be allowed to question the validity of the Nevada divorces in a criminal proceeding for bigamous cohabitation.¹³ But such an argument is difficult to sustain. Says Mr. Justice White, "The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil."¹⁴ The state is vitally interested in the marriage relation because it affects society as a whole, its welfare and continued well-being. This interest is based upon a general public order and sound public policy, in pursuance whereof conditions are prescribed upon which per-

10. 325 U. S. at 264. 65 Sup. Ct. at 1111.

11. See Justice Black's dissent, 325 U. S. at 275. 65 Sup. Ct. at 1116.

12. See note 5 *supra*.

13. 325 U. S. at 266-267.

14. *Andrews v. Andrews*, 188 U. S. 14, 41 (1903).

sons may enter into and then dissolve the marital relation. To enforce such policy the state provides penalties for the violation of its marriage law. As the majority of the Court assert, the state interest is not identical with that of the parties to the marital relation. The fact that in the instant case the other spouses did not object to the divorce, that one of them had died and the other remarried, would, therefore, be immaterial. Were the marriage relation not interwoven with public policy the parties would be free to terminate it at will.

The minority of the Court contend that even in the absence of the special facts referred to by Mr. Justice Black the full faith and credit clause of the Federal Constitution should prevent the State of North Carolina from challenging the Nevada divorces in a criminal proceeding. On the other hand, if the suit is one to terminate maintenance and support on account of the dissolution of the marriage, as in the case of *Esenwein v. Commonwealth of Pennsylvania*,¹⁵ decided contemporaneously with the *Williams* case, the same minority are ready to admit that the Nevada divorce decrees may be challenged on the ground that the parties had not acquired a bona fide domicil in Nevada.¹⁶ According to this view, North Carolina must recognize

15. 325 U. S. 279. 65 Sup. Ct. 1118. 89 L. Ed. 1608, 157 A. L. R. 1396 (1945).

16. Mr. Justice Douglas seeks to justify this distinction in the following manner:

"I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support.

"We held in *Williams v. North Carolina*, 317 U. S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman whom Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See *Yarborough v. Yarborough*, 290 U. S. 202, 54 Sup. Ct. 181, 78 L. Ed. 269, 90 A.L.R. 924; *Davis v. Davis*, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. Ed. 26, 118 A.L.R. 1518. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. See *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. See *Magnolia Petro-*

migratory Nevada divorces if their non-recognition would make bigamists of the parties obtaining them if they remarry, and bastards of the offspring of their second marriage, but would allow them to be attacked on the issue of domicil where maintenance and support of the other spouse or the children are involved.

The ultimate question, therefore, is what are the respective rights, privileges and powers of the states of North Carolina and Nevada with respect to the marital relations of the parties before the court. Under the facts of the case, has Nevada the power to divorce the parties? Has it the power to do so, under the due process clause of the Federal Constitution, so far as the status of the parties in Nevada is concerned? Has it this power, under the full faith and credit clause, so far as the recognition of the divorce by other states is concerned? Or does the power under the latter clause depend upon who seeks to attack the divorce, the power being recognized, as the minority of the Supreme Court would have it, if the State of North Carolina challenges the validity of the decree in a criminal proceeding, but denied if the action is for support and maintenance by the other spouse or children? The Supreme Court of the United States as interpreter of the Federal Constitution being the ultimate judicial arbiter in these matters, where shall the line be drawn?

Our law is extremely liberal in providing access to our courts. Generally speaking, they are open to all, residents and non-residents, citizens and aliens. In transitory actions jurisdiction will be taken although the cause of action has no connection with the state. All that is required is personal jurisdiction over the defendant. But jurisdiction for divorce is generally regarded as requiring some close connection between the individuals involved and the state of divorce, the connecting link

leum Co. v. Hunt, 320 U. S. 430, 447, 64 Sup. Ct. 208, 217, 88 L. Ed. 149, 150 A.L.R. 413 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. See *Williams v. North Carolina*, *supra*. One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all. See *Radin*, *The Authenticated Full Faith and Credit Clause*, 39 Ill. L. Rev. 1, 28." *Esenwein v Commonwealth of Pennsylvania*, 325 U. S. at 282-283.

being either domicil or nationality.¹⁷ In Anglo-American law domicil has been commonly adopted as the jurisdictional test.¹⁸ It has seemed best to the English and American judges that family relations should be changed only by the courts of the state in which the parties had their home (domicil), such state having the principal interest in those relations.

But, says Mr. Justice Rutledge, the concept of domicil is too vague, for it depends upon a mental condition, which can afford no stable test; it has been introduced into the Constitution by the judges and it is time that it should be eliminated as impractical and useless. True, domicil in this country has lost much of the stability it possessed in earlier times, and especially in England. People are in the habit of changing their homes frequently from state to state. In many cases they have homes in several states. Again, married women are permitted to have domicils different from their husbands. Under present conditions, therefore, it is frequently difficult, if not impossible, to ascertain where the domicil of a person is. Furthermore, as the primary test of domicil is the intention to remain in the state permanently or for an indefinite and unlimited time, there is the possibility that the parties may for certain purposes claim a fictitious domicil in a state. This is especially true in matters of divorce.

What other test besides domicil could the Supreme Court adopt for jurisdiction for divorce? At this late date it could not say very well that a suit for divorce is an ordinary adversary proceeding which requires only jurisdiction over the parties. In a divorce proceeding there must be something more

17. Nationality is frequently the test in continental countries. See RABEL, *THE CONFLICT OF LAWS—A COMPARATIVE STUDY* (1945) 397.

18. The relinquishment of domicil or long continued residence as a requirement for jurisdiction for divorce would lead to a serious dilemma in the matter of substituted service. Under the existing order such service is permitted in actions in rem or quasi in rem because the property or status is or is deemed to be within the state. In actions in personam it is allowed where the defendant has his domicil within the state [*Milliken v. Meyer*, 311 U. S. 457 (1940)], (perhaps) where a non-resident conducts a business within the state, as regards causes of action arising out of that business [see *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623 (1935)], and under the auto statutes, where a nonresident owner of an automobile causes injury to person or property within the state [*Hess v. Pawloski*, 274 U. S. 352 (1927)]. Substituted service in a divorce proceeding, when the defendant is not domiciled within the state, has been justified in the past on the ground that such a proceeding relates to status, which is deemed to have a situs in the state in which either the petitioner or the respondent has his home, that is, his *fixed* connection with the state. With the abandonment of such connection there remains no basis upon which substituted service would meet our conceptions of due process of law.

than mere personal jurisdiction.¹⁹ Moreover, regarding the proceeding as one in personam would not solve the migratory divorce problem except in the cases in which the respondent is willing to appear, for under the accepted doctrines an unwilling respondent cannot be brought before the court by substituted service.

Could not mere residence on the part of the petitioner be regarded as a sufficient basis of jurisdiction for divorce, and substituted service upon the respondent be allowed? From a technical point of view the answer is probably "yes," but in my opinion the Supreme Court wisely refrained from taking this step. If the residence were for a reasonable period (in my former article²⁰ I suggested six months; Rabel feels that a year should be the minimum²¹), it would seem that the respondent might properly be brought into court by substituted service, in view of the fact that the petitioner would then have established a connection with the state sufficient to justify its changing his family relations. But if residence were accepted as a substitute for domicile, a state might reduce the requirement of residence to one or two days. That being the case, the Supreme Court as arbiter between the conflicting claims of North Carolina and Nevada could not very well adopt residence as a test for the determination of the power of Nevada to grant divorces which must be accepted as binding everywhere. If the Supreme Court as such arbiter had the power to fix a period of residence sufficient to establish a serious connection between the petitioner and the state of divorce, all would be well, but this involves a legislative rather than a judicial function and is thus not available to the courts.

Depending as it does upon a state of mind, domicile admittedly does not furnish a satisfactory basis for our interstate divorce law because different courts and juries may draw different conclusions from the same facts, with the result that the divorce may be recognized in one state and not in another. The

19. Mr. Justice Douglas in *Williams v. North Carolina I*, 317 U. S. 287, 297 (1942), said, "We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*. Such a suit, however, is not a mere *in personam* action."

Mr. Justice Frankfurter in *Williams v. North Carolina II*, 325 U. S. at 232 (1945), said, "Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions *in rem*."

Rabel says, "The fact is that American divorce law has outgrown the doctrine of jurisdiction *in rem*." *Op. cit. supra* note 17, at 404.

20. Lorenzen, *Haddock v. Haddock Overruled* (1943) 52 YALE L. J. 341, 352.

21. RABEL, *op. cit. supra* note 17, at 460-1.

remedy, however, it would seem, does not lie with the courts, but with Congress, which can specify a period of residence which shall satisfy the full faith and credit requirements of the Federal Constitution.²²

Mr. Justice Black strenuously objects to the expansion of federal power by the majority of the Court in making domicil the test of the validity of the Nevada divorce decrees in Nevada under the due process clause.²³ His contention is not, of course, that there should be different jurisdictional requirements for the validity of divorces under the due process clause and the full faith and credit clause; he insists, rather, that the divorce and subsequent marriage are valid under the law of Nevada and for that reason must be recognized by North Carolina under the full faith and credit clause. As the majority of the Court have held in *Williams v. North Carolina II* that domicil is the jurisdictional test for the compulsory recognition of the Nevada decrees by North Carolina, the same test should determine the validity of the divorce in Nevada under the due process clause, for under the supporting act of Congress with respect to the former clause the Nevada decrees are entitled elsewhere to the same faith and credit as they have in Nevada.

Whereas the Supreme Court of the United States has had little occasion to discuss the validity of divorces from the standpoint of due process, it has pronounced itself in a number of cases on the validity of foreign divorce decrees under the full faith and credit clause.²⁴ Its latest interpretation leads to

22. Until Congress acts, it would seem, therefore, that the existence of a bona fide domicil in the state must remain an indispensable requisite for divorce jurisdiction. "Under our system of law," says Mr. Justice Frankfurter, "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil." *Williams v. North Carolina II*, 325 U. S., at 229 (1945).

23. *Id.* at 271.

24. In *Bell v. Bell*, 181 U. S. 175 (1901), the New York courts declined to recognize a Pennsylvania divorce obtained by the husband from his New York wife, the Pennsylvania law requiring bona fide residence (domicil) for one year. The respondent was served only constructively. It was found by the Pennsylvania court that the petitioner had not acquired a bona fide domicil in Pennsylvania. Under these circumstances the Supreme Court of the United States held that the divorce need not be recognized in New York.

The same conclusion was reached in *Streitwolf v. Streitwolf*, 181 U. S. 179 (1901); in this case the husband obtained a North Dakota divorce from his New Jersey wife. North Dakota required residence (domicil) for ninety days as a prerequisite to jurisdiction for divorce.

Andrews v. Andrews, 188 U. S. 14 (1903), held that Massachusetts was not bound by the full faith and credit clause to recognize a divorce which the husband had obtained in South Dakota, in which state neither party

the conclusion that a divorce decree must be recognized by all other states if the petitioner has acquired a bona fide domicil in the state of divorce, even though the respondent was brought before the court only by substituted service, but that without a bona fide domicil in the state the decree need not be recognized.

The question remains whether approval should be given to Mr. Justice Rutledge's suggestion that if the test of domicil must be retained by the courts until Congress brings order into the divorce situation, the Supreme Court should not allow the Nevada divorce decrees to be attacked in other states by standards of proof other than those available in the case of direct attack.²⁵ If as between North Carolina and Nevada the latter

was domiciled, notwithstanding the fact that the wife, through her attorney, had consented to the granting of the decree.

In *Atherton v. Atherton*, 181 U. S. 155 (1901), the New York courts were held bound to recognize a divorce granted at the matrimonial domicil (Kentucky), in which state alone the spouses had lived as husband and wife, although the wife had left the state and resumed her former New York domicil and was served only constructively.

Haddock v. Haddock, 201 U. S. 562 (1906), decided that the New York courts need not recognize a Connecticut divorce obtained upon substituted service by the husband who had wrongfully left his New York wife but had acquired a bona fide domicil in Connecticut.

Davis v. Davis, 305 U. S. 32 (1938), held that the parties litigating the issue of domicil in the divorce court are precluded from raising the question again in another suit.

In *Williams v. North Carolina I*, 317 U. S. 287 (1942), the doctrine of the *Haddock* case was overruled. The establishment of a bona fide domicil in Nevada not having been challenged in North Carolina, the courts of that state were held bound to recognize the Nevada decrees, although jurisdiction over the respondents had been obtained only by substitutive service.

In *Williams v. North Carolina II*, 325 U. S. 226, 65 Sup. Ct. 1092, 80 L. Ed. 1577, 157 A. L. R. 1366 (1945), North Carolina challenged the acquisition of bona fide domicil in Nevada, and the Supreme Court held that it could do so notwithstanding a finding of domicil by the Nevada courts and a recital to that effect upon the record.

25. The Nevada divorces probably can withstand a direct attack. Says Mr. Justice Black, "As I read that evidence, it would have been sufficient to support the findings had the case been reviewed by us." *Williams v. North Carolina II*, 325 U. S. at 270. Indeed there is evidence in the record (though false) that the parties intended to make Nevada their permanent home, together with other fictitious corroborative testimony. Such false or fictitious testimony, however, cannot be challenged in a direct attack, in which the only question is whether the finding of domicil can be reasonably sustained on the evidence.

Nor can the Attorney General of Nevada bring an independent action to set aside Nevada divorce decrees for fraud or collusion. The Supreme Court of Nevada has held that the interests of the state in divorce proceedings are represented by the courts exclusively, and that the Attorney General has no power to intervene. *State v. Moore*, 46 Nev. 65, 207 Pac. 75 (1922).

has the constitutional power to change the marital relations of the spouses through divorce *only* if the petitioner has acquired a bona fide domicil in the state, the suggestion can hardly be accepted, for it would set the seal of approval by the Supreme Court of this country upon the commercialized divorce legislation, such as obtains in Nevada. If the requirement of a bona fide domicil cannot be attacked collaterally by proof of facts occurring subsequently to the granting of the divorce, such as the fact that the party left the state immediately after obtaining the divorce, it is tantamount to holding that a residence of six weeks is sufficient without domicil, for in the great majority of cases the finding of domicil by the Nevada courts in these migratory divorces is based upon perjury and fictitious testimony. The Supreme Court certainly cannot afford to lend its hand in support of such practice. Its judicial conscience is charged with knowledge of the fact that the parties going to Nevada for a divorce intend to stay there only six weeks and then return to their former homes. That does not constitute domicil as understood in Anglo-American conflict of laws, vague and shadowy as the term may be.

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18. APPLICATION OF THE FULL FAITH AND CREDIT CLAUSE TO EQUITABLE DECREES FOR THE CONVEYANCE OF FOREIGN LAND*†

THE Constitution of the United States provides: "Full faith and credit shall be given in such state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be approved, and the effect thereof."

In pursuance of the power vested in it, Congress has prescribed the mode of authentication and the effects of such acts, records and proceedings as follows:¹ "and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is a settled rule that the full faith and credit clause applies only to substantive rights and that it has no application to matters of procedure.² Hence, if it can be shown that equitable decrees do not establish obligations, that is, right-duty relations, but are merely methods for the enforcement of existing legal relations, it follows of course that they are not within the purview of the full-faith and credit clause.

The first issue relates therefore to the nature and effect of equitable decrees in general.

If we go back as far as the Year Books we find Knightly, Sergeant at Law, making the following statement:³

* (1925) 34 Yale Law Journal 591.

† The writer wishes at the outset to acknowledge his deep obligations to Professor W. W. Cook and to the late Professor Willard Barbour. The fundamental views presented in this paper, founded on an address by the present writer before the Round Table on Public Law of the Association of American Law Schools at their meeting in Chicago in December, 1924, were first worked out in an article entitled "*The Powers of Courts of Equity*" (1915) 15 COL. L. REV. 37, 106, 228, by Professor Cook, and further developed in an article entitled "*The Extra-Territorial Effect of the Equitable Decree*" (1919) 17 MICH. L. REV. 527, by Professor Barbour.

1. Act of May 26, 1790, U. S. Rev. Sts. 1790, sec. 905.

2. *McElmoyle v. Cohen* (1839, U. S.) 13 Pet. 312.

3. Y. B. 27 Hen. VIII, f. 15, pl. 6.

"A decree is not like a judgment in the King's Bench or Common Bench, for such a judgment binds the right of the party; but a decree does not bind the right, but only the person to obedience, so that if the party will not obey, then the Chancellor may commit him to prison until he will obey and this is all that the Chancellor can do."

In another Year Book case the following appears:⁴

"For the common law proceeds upon fixed and invariable rules; the Chancery proceeds upon the discretion of a good man. A decree there binds the person to obedience, but it does not operate at all upon the matter in question."

Referring to the above cases, Coke expressed the matter as follows:⁵

"This court of equity, proceeding by English bill is no court of record and therefore it can bind but the person only, and neither the estate of the defendant's lands nor the property of his goods and chattels."

From the following extracts from eminent American writers it would seem as if there still existed a fundamental difference between judgments at law and decrees in equity. One of these writers said in 1883:⁶

"Indeed, it may be stated broadly that a decree in chancery has not in itself (i. e., independently of what may be done under it) any legal operation whatever. If a debt, whether by simple contract or by specialty, be sued for in a court of law, and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree. Undoubtedly it has often been said by chancellors that their decrees are equal to judgments at law, but that only means that they will, to the extent of their power, secure for their decrees the same advantages that judgments have by law; it does not mean that a decree is by law equal to a judgment.

"Again, if a claim be made the subject of an action at law, and judgment be rendered for the defendant upon the merits, the judgment is conclusive evidence that the claim was not well founded, and it will therefore furnish a perfect defense to any future action upon

4. Y. B. 37 Hen. VI, f. 13, pl. 3; Jenk. Cent. Cas. 108, pl. 9; 1 Ames, *Cases on Equity* (1901) 2, note 1.

5. 4 Coke, *Institutes*,* 84.

6. Langdell, *Summary of Equity Pleading* (2d ed. 1883) 37, sec. 43, n. 4.

the same claim; but a decree in equity against the validity of a claim is never a defense to an action at law upon the same claim. Here again, however, the chancellor will make his decrees equal to judgments so far as it is in his power to do so; and therefore a decree in chancery against a claim upon its merits will always be a defense to any future suit in chancery upon the same claim, not as destroying the claim or as proving conclusively its invalidity, but as furnishing a sufficient reason why chancery should not again take cognizance of it. Such a decree will also be (what is sometimes called) an equitable defense to any action at law upon the same claim, i. e., the chancellor will enjoin the prosecution of any such action, upon the ground that the plaintiff having elected to make his claim the subject of a suit in equity, and that suit having been defended successfully upon the merits, it is not right that the defendant should be vexed again by the same claim."

Another writer expressed himself in 1902 as follows:⁷

"An equitable decree for the doing of an act, except the mere payment of money, is not by our law enforceable in another court, even of the same state; there is no form of proceeding for enforcing the merely personal decree of a court of equity, except by order of the court rendering it. It is, therefore, impossible to enforce a foreign decree that an act be done by the defendant, such as making a conveyance, either by decreeing the conveyance without judicial investigation or by regarding it as made. An additional objection to enforcing such a decree is that it is not in its nature the establishment of an obligation, but rather a method of enforcing an obligation, a form of execution."

Still another writer used the following language in 1920:⁸

"But it is to be noted that it is only money judgments that are enforced abroad, and that this "enforcement of the judgment" is a dogmatic fiction. In the Roman law the claim sued on underwent a novation in the 'procedural contract' of *litis contestatio*. In our law the debt sued on was merged in the judgment. Hence in legal theory the original claim no longer existed, and in order to allow it to be asserted abroad, it became necessary to invoke a 'quasi-contractual' obligation to pay the judgment. But in equity the suit is to compel defendant to do his duty and that duty is not necessarily merged in the decree, so that if the decree fails of effect, an action may still be brought upon plaintiff's legal right, if he has one. Thus, there was never any necessity for proceeding subsequently on a theory of enforcing the decree rather than the original claim."

7. 3 Beale, "Summary of the Conflict of Laws," *Cases on the Conflict of Laws* (1902) 536, 537.

8. Pound, *The Progress of the Law—Equity* (1920) 33 HARV. L. REV. 420, 424.

Other writers have challenged in recent years the correctness of the statements contained in the above extracts. In 1919 one of these critics said⁹ that statements like the above assume "that equity has made no progress since the time of Coke." In another place he said,¹⁰ "The notion that an equitable decree which orders the conveyance of land cannot create a binding obligation is the last survival of an old dogma which is to-day shorn of most of its force."

Another critic writing four years earlier and voicing the same sentiment, asked the question:¹¹ "Is it not time for judges and writers to stop talking language suitable to the time of Coke in discussing the power of equity, and to recognize that a court of equity is a legal tribunal with powers to adjudicate and settle controversies as finally as a court of law?"

This is not the proper occasion for a detailed examination of the history of equity since the time of Lord Coke for the purpose of ascertaining how the nature of equitable decrees has changed since those days when the court of chancery was merely a court of conscience. Let us examine the question simply from the standpoint of our own law of to-day. Let us consider, first, whether there is any important difference to-day between judgments at law and equitable decrees as regards the doctrine of *res judicata* and merger.

Suppose A claims that B owes him \$100 and that after a hearing on the merits, a judgment is rendered in B's favor. If A should sue B again for the \$100, B can defeat A's claim by the plea of *res judicata*. If the judgment in the first suit were rendered in A's favor, it would operate as a merger of the cause of action and a second suit could not be brought on the original cause of action. Would the same results obtain if the suits had been in equity? Let us see how our courts answer this question.

In *Young v. Farwell*,¹² the plaintiff sued the defendant for the reasonable value of services. The defendant answered that an action had been brought against him by the plaintiff in a chancery court of Illinois on the same cause of action and that a final decree had been rendered between the parties in favor of the defendant and against the plaintiff. It was held that the judgment of the Illinois court was a conclusive adjudication against the plaintiff's claim. The court said:¹³

"It makes no difference that the judgment, or decree, set up by way of estoppel, was one rendered in an equitable action for an ac-

9. Barbour, *op. cit. supra* note †, 528.

10. *Ibid.* 539.

11. Cook, *op. cit. supra* note †, 233-234.

12. (1901) 165 N. Y. 341, 59 N. E. 143.

13. At p. 345, 59 N. E. 144.

counting; provided that the question involved in this common law action was involved and determined in the equity action. That a decree rendered in a cause, depending between parties in equity, may be a bar to an action at law between them cannot be questioned."

In *Harrington v. Harrington*,¹⁴ assumpsit was brought on a contract for rents and profits. The same matter which was in dispute in this suit was included in a suit in equity in Rhode Island and had been heard and passed upon there and a final decree entered in favor of the plaintiff. It was held that the equitable decree was a bar to the action. The court said:¹⁵

"Whether, therefore, the court in that state was 'a court of law or equity, of admiralty or probate,' the matter in controversy and the parties being the same in this suit as in that, the judgment of that court is conclusive and is a bar to the present action."

In another case, *Mutual Life Ins. Co. v. Newton*,¹⁶ the plaintiff foreclosed a mortgage in New Jersey and got a statutory decree for deficiency. He later sued on the bond secured by the mortgage. It was held that plaintiff's rights arising from the execution of the bond had been extinguished. The court said:¹⁷

"The doctrine of *res adjudicata* is plain and intelligible, and amounts simply to this: that a cause of action once finally determined without appeal between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding, either by the same or any other tribunal. . . . And this is true, whether the first adjudication is in a court of law or equity. . . . Hence, it is settled that a verdict and judgment of a court of record or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit. . . . If the decree is final, then its result is to merge the original cause of action.

In view of these and other cases¹⁸ holding the same doctrine, it is apparent that the statement made by the third writer, quoted from above—"but in equity the suit is to compel defendant to do his duty and this duty is not necessarily merged

14. (1891) 154 Mass. 517, 28 N. E. 903.

15. At p. 519, 28 N. E. 903.

16. (1888) 50 N. J. L. 571, 14 Atl. 756.

17. At pp. 576-577.

18. See for example *Dobson v. Pearce* (1854) 12 N. Y. 156, where it was held that a Connecticut decree determines conclusively that a New York judgment had been obtained by fraud. In regard to this case, see Cook, *op. cit. supra* note †, 248-249. In *Fromholz v. McGahey* (1915) 120 Ark. 216, a Nebraska decree dismissing a bill to set aside a deed to Nebraska land was held conclusive.

in the decree so that if the decree fails of effect, an action may still be brought upon plaintiff's legal right, if he has one"¹⁹—does not apply to causes of action involving the payment of money.²⁰

It must be likewise apparent that the statement made in 1883 by the writer quoted from above—"if a debt . . . be sued for in a court of law and judgment recovered, the original debt is merged in the judgment, and extinguished by it, and the judgment creates a new debt of a higher nature, and of which the judgment itself is conclusive evidence. But if the same debt be sued for in the court of chancery (as it frequently may be) and a decree obtained for its payment, not one of the effects before stated is produced by the decree"²¹—does not express accurately the existing law.

Let us now examine the other assertion made by the same writer, namely, that the judgment at law creates a new debt of a higher nature and of which the judgment itself is the conclusive evidence, whereas the decree for the payment of money has no such effect. Otherwise expressed, the argument is that a judgment at law creates a new obligation; a decree in equity for the payment of money does not. This is a most important point in the discussion of this topic, for if an equitable decree for the payment of money does not create a new obligation, a new right-duty relation, it will, in the nature of things, be difficult, if not impossible, to establish such with reference to equitable decrees for the doing of some other act, for example, the conveyance of land.

What do the courts hold on this point? As early as 1794 there was a Connecticut case,²² in which an action of debt was brought for 60 pounds, declaring upon a degree in chancery for the penalty of 60 pounds. The jury having found for the plaintiff, the defendant moved in arrest of judgment that the declaration of the plaintiff was insufficient, for an action of debt at law would not lie for a penalty incurred upon a decree in chancery. The opinion reads:²³

"The court were clearly of opinion that the action well lay, for an action of debt lies for a sum certain, either by simple contract, by specialty, by judgment of court, by statute, or by decree in chancery,

19. Pound, *loc. cit. supra* note 8.

20. Nor would it seem to apply to decrees for the doing of something other than the payment of money. *Fitzgerald v. Hedy* (1916) 225 Mass. 75, 113 N. E. 844.

21. Langdell, *op. cit. supra* note 6, 37.

22. *Drakesly v. Roots* (1794) 2 Root, 138; given also in 1 Cook, *Cases on Equity* (1924) 91.

23. *Loc. cit.*

if the thing decreed be performed under a penalty is not performed, the penalty is incurred and becomes a debt."

In *Post v. Neafie*,²⁴ an action of debt was brought upon a decree pronounced by the court of chancery for the state of New Jersey. At the trial the defendant moved for a non-suit on the ground *inter alia* that no action at common law would lie to enforce the decree of a court of chancery, domestic or foreign. It was held that the action would lie and that decision has been followed practically ever since.²⁵

The Supreme Court of the United States has held that equitable decrees for the payment of money, provided they are final, must be given the same effect as judgments at law under the full-faith and credit clause of the Federal Constitution.²⁶

Notwithstanding this array of authority, those subscribing to the orthodox view contend that the new obligation created by the equitable decree arises not from principles of equity but from the operation of legislation which has placed equitable decrees for the payment of money upon the same footing as judgments at law. Effect is given, it is said, to the foreign equitable decree because in the jurisdiction in which it was rendered it had been given the same effect as a judgment at law. This contention is made, although no such limitation appears from the cases. In the leading case above referred to, *Post v. Neafie*, there was such a statute in New Jersey, but Livingston, J., stated expressly:²⁷

"I lay no stress on the statute of New Jersey, which renders a decree in chancery of equal effect with a judgment of its supreme court; because, for the purpose of this action, we are not bound to take notice of the manner of proceeding in a foreign court of equity, even admitting, which we do not know judicially, that they are the same as with us; it is enough that it has settled what is due from the one to the other of the parties litigant. But if I had the smallest doubt of the propriety of this suit, this statute would remove it."

As statutes of the type referred to have existed from very early times, it may very well be that in the cases adopting the rule laid down in *Post v. Neafie*, there actually were such stat-

24. 3 Caines (1805, N. Y.) 22.

25. An action of debt or a similar action has been held to lie also in the same state for the enforcement of a domestic decree for the payment of money. *Ames v. Hoy* (1859) 12 Calif. 11, 20; *Howard v. Howard* (1818) 15 Mass. 196; see also Cook, *op. cit. supra* note †, 242-243.

26. *Lynde v. Lynde* (1901) 181 U. S. 183, 21, Sup. Ct. 555; *Sistare v. Sistare* (1910) 218 U. S. 1, 30 Sup. Ct. 682.

27. *Supra*, note 24, at p. 33.

utes in the states in which the decrees were rendered. Even if it should appear that such were the case, it would seem, however, from the cases that the result was reached on principle and not because of the statutes.

But even if it were conceded for the sake of argument that an action at law for the enforcement of foreign decrees could not have been brought in this country at the time *Post v. Neafie* was decided in 1805, in the absence of statutes giving equitable decrees for the payment of money the same effect as judgments at law, it would by no means follow that the decree did not create a new right-duty relation between the parties, an obligation, but imposed merely a personal duty to the court. For our purpose it is sufficient if it can be shown that an equitable decree for the payment of money created a right, legal or equitable. The question is thus whether at the time of the decision of *Post v. Neafie* a decree of equity created, if not a legal, at least an equitable right. We have the opinion of no less an authority than that of Chancellor Kent to the effect that a decree did create an equitable right. He felt that there was no authority for allowing an action at law upon a foreign equitable decree, statute or no statute, and was unwilling to take such a forward step in the absence of precedent. He dissented, therefore, in that case from the majority of the court. Relying upon a case decided by Lord Hardwicke in 1737, he held, however, that the plaintiff had an equitable right and that instead of suing at law, he should have proceeded to enforce such right in equity. He says:²⁸

"The plaintiffs are not without remedy in the present case, since our court of chancery is the proper tribunal for them to resort to; and for this we have an authority in Morgan's case, in the time of Lord Hardwicke, 1 Atk. 408. In that case a Welsh court of equity had decreed payment of a legacy, and the defendant, to avoid execution of that decree, fled into England. A bill was filed before Lord Hardwicke, stating the proceedings and decree in Wales, and the flight of the defendant, and the chancellor sustained the bill after demurrer, holding that an original independent decree might be had in that court for the legacy."

We have herein a clear recognition of the fact that a decree in equity for the payment of money imposes not merely a personal duty on the defendant with reference to the particular court, but that it creates an equitable right which can be enforced elsewhere. The criticism that has been made of cases like

28. *Ibid.* at p. 36.

Mallette v. Scheerer,²⁹ and *Matson v. Matson*,³⁰ that they rest upon the false analogy of the enforcement of foreign judgments and of foreign money decrees,³¹ is, therefore, without foundation.

The above development in our law has met with great opposition, for the notion that judgments at law are fundamentally different from equitable decrees has been accepted by Anglo-American lawyers since the days of Lord Coke as such an elementary and self-evident proposition that only the most pressing arguments of convenience have been able to induce the courts to abandon the old dogma. Although courts of equity have long since become courts of record and are coördinate with courts of law in our modern legal system, presided over often by the same judges, there has been a tendency to repeat the traditional phrases about the relation of law and equity, judgments at law and decrees in equity. We find, therefore, that every step in the direction of placing decrees of equity on the same footing with judgments at law has been taken only after a severe struggle. As has been shown above, decrees for the payment of money are at length recognized as *res judicata*, as merging the original cause of action and as creating an equitable right which may be enforced in other jurisdictions by a new suit. This much is admitted, although, as we have seen, it is still sought to ascribe the development of the doctrine that equitable decrees for the payment of money are enforceable in other jurisdictions to the operation of statutes rather than to a change of attitude on the part of the courts with reference to equitable decrees themselves.

In the light of this, it will not be surprising to find even stronger opposition to the idea that equitable decrees ordering something other than the payment of money—for example, the conveyance of foreign land—should of themselves have any effect other than imposing a personal duty on the defendant with respect to the particular court. Before considering the grounds upon which the specific objections to this new step in the development of our law are based, let us see what the American cases actually hold on the subject.

As early as 1873, we find a decision which has been a great stumbling block to the adherents of the orthodox view. This is the case of *Burnley v. Stevenson*.³² In that case A, who had agreed to convey to B certain land in Ohio, died without making the conveyance and B thereupon brought in Kentucky in a

29. (1916) 164 Wis. 415, 160 N. W. 182.

30. (1919) 186 Iowa, 607, 173 N. W. 127.

31. Pound, *op. cit. supra* note 8, 424.

32. (1873) 24 Ohio St. 474, 478.

court of equity suit against A's heirs. The court entered a decree ordering the heirs, who were before the court, to convey the land to B and in default thereof directing a master of the court to make the conveyance. Defendant, who succeeded to B's rights, obtained possession of the land. Plaintiff sued in the right of A's heirs in Ohio to recover possession of the land. Defendant in his answer set up the Kentucky decree and the master's deed. This answer was held to constitute a good equitable defense. The court said:

"That courts exercising chancery powers in one state have jurisdiction to enforce a trust, and to compel the specific performance of a contract in relation to lands situate in another state, after having obtained jurisdiction of the persons of those upon whom the obligation rests, is a doctrine fully settled by numerous decisions.

"It does not follow, however, that a court having power to compel the parties before it to convey lands situated in another state, may make its own decree to operate as such conveyance. Indeed, it is well settled that the decree of such court can not operate to transfer title to lands situate in a foreign jurisdiction. And this, for the reason that a judgment or decree in rem cannot operate beyond the limits of the jurisdiction or state wherein it is rendered. And if a decree in such case cannot effect the transfer of the title to such lands, it is clear that a deed executed by a master, under the direction of the court, can have no greater effect. . . .

"This decree was in personam, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans [B], was thus established by the decree of a court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that court by attachment as for contempt, and the fact that the conveyance was not made in pursuance of the order does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties, and those holding under them with notice, are still bound thereby.

"Under our Code of Practice, equitable as well as legal defenses may be set up in an action for the recovery of land. The defendant in the court below set up this decree of the circuit court of Kentucky as a defense to the plaintiff's action. That it did not constitute a good defense at law may be admitted, but we think, in equity, it was a sufficient defense.

"The Constitution of the United States declares that full faith and credit shall be given in each state to the records and judicial proceedings of every other state, and provides that Congress may prescribe the mode of proving such records and proceedings, and the effect thereof. By an act of May 26, 1790, Congress declared that the

'records and judicial proceedings of the state courts,' when properly authenticated, 'shall have the same faith and credit given to them in every court within the United States as they have by law or usage, in the courts of the state from whence they are or shall be taken.' When, therefore, a decree rendered by a court in a sister state, having jurisdiction of the parties and of the subject matter, is offered as evidence, or pleaded as the foundation of a right, in any action in the courts of this state, it is entitled to the same force and effect which it had in the state where it was pronounced. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this state, we have already shown; hence the courts of this state must accord to it the same effect. True, the courts of this state cannot enforce the performance of that decree, by compelling the conveyance through its process of attachment; but when pleaded in our courts as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud."

In 1880 the question came up before the Supreme Court of New York in the case of *Roblin v. Long*.³³ In that case an action was brought in New York to enforce a decree of a court of chancery of Ontario, Canada, ordering the conveyance of land in Ontario. One of the defenses interposed was that the court had no jurisdiction to enforce such a decree. The court held the defense to be frivolous, saying: "This court having acquired jurisdiction of the person of the defendant, it possesses full power to enforce the judgment and decree of the chancery court of Canada, to the extent of compelling defendant to convey the lands mentioned in the complaint, though the same are situated in the province of Canada and without the jurisdiction of this court." In other words, the court here recognized that the Canadian decree ordering the defendant to convey to plaintiff Canadian land created a good equitable cause of action in New York.

The question came up before the Supreme Court of Michigan in 1896 in the case of *Dunlap v. Byers*.³⁴ Suit had been brought in Ohio for the dissolution of a partnership between A and B. The court having jurisdiction of the parties decreed the dissolution of the partnership, appointed a receiver, and directed him to sell the interest of the partnership in certain lands in Michigan. The sale was made to A and was duly confirmed by the court, the receiver being ordered to execute a bill of sale to A. B was ordered to execute a quit-claim to A but died before having obeyed the order of the court. B's heirs brought ejectment in Michigan against the purchasers of certain of those

33. (1880) 60 How. Pr. 200.

34. (1896) 110 Mich. 109, 116, 67 N. W. 1067, 1070.

lands and executed a mortgage covering part of these lands to C, who was fully informed of the title to the property. A bill was thereupon filed to restrain B's heirs from prosecuting the action of ejectment and to compel them to transfer to complainants the legal title in accordance with the Ohio decree and to have the mortgage to C declared void. A decree was entered in accordance with the prayer of the bill. B's heirs contended that the Ohio decree and sale thereunder was null and void for want of power in the court to make such a decree, and that the sale did not of itself divest or in any manner affect B's title to the lands in question. The court said:

"In effect, the rule is that, for the purposes of settlement, partnership lands cannot be distinguished from other assets. It therefore seems to us to appear conclusively that the superior court of Cincinnati acquired jurisdiction, not only over the parties, but over the subject matter, and had the power to adjudicate the rights of the parties in all the property belonging to the partnership, although a portion of the same was real estate in the state of Michigan. This appears to be the general rule, and is supported by a large number of authorities cited in the brief of counsel for the complainants. . . .

"So the rule seems to be well settled that while the decree itself, in such cases, would not directly effect the transfer of title, the decree of the court would bind the consciences of the parties, and could be enforced by a court within the territory where the property was located."

In 1912, the following case came before the highest court of West Virginia in *Roller v. Murray*.³⁵ Suit was brought for the specific performance of a contract to convey land in West Virginia. The contract also involved land in Virginia and suit for specific performance had previously been brought in that state and the suit dismissed, the contract being declared champertous. This decree was set up in an answer to the suit for specific performance in West Virginia. Although the agreement to convey the land was valid by the law of West Virginia, it was held that the Virginia decree was entitled to full faith and credit. The court said:

"The validity of that contract was directly in issue in the Virginia court between the persons who are parties to this suit and the question of its validity actually decided . . . that decision obviously and necessarily settles and determines that question in the state of Virginia and precludes any subsequent trial of it there between the same parties in any other litigation in which it may be material, no matter what the form of action or character or measure of relief sought.

35. (1912) 71 W. Va. 161, 169, 76 S. E. 172, 176.

Being *res adjudicata* in Virginia, it must be so in West Virginia, because the Virginia decision must have the same faith and credit in all other states that it is entitled to in that state."

In 1923, the following question came before the District Court of Appeal of California, in *Redwood Investment Co. v. Exley*.³⁶ The defendant had entered into a contract with the plaintiff in Kentucky to convey to him his interest in California land. In a suit for specific performance in Kentucky, the defendant was ordered to make a conveyance of the land to the plaintiff. The defendant did not comply with the decree and before the time limited for the making of the conveyance, executed a deed of the land to A, who executed a mortgage to defendant. Defendant assigned the mortgage to E. Plaintiff brought a bill in California, alleging the above facts, also that the several conveyances had been made without consideration and with full knowledge of the Kentucky decree. The plaintiff prayed that he be deemed the owner of defendant's interest in the land, that the deed to A and the mortgage by A to D, together with the assignment thereof to E, be declared null and void and that A be compelled to convey the land to plaintiff. The demurrer to plaintiff's petition was sustained by the trial court, but was reversed on appeal. The Supreme Court of the state denied a rehearing. The Court of Appeal said:

"There can be no question that real property is exclusively subject to the laws and jurisdiction of the state where located, and that no other laws or courts can affect it by an attempt to create, transfer, or vest title thereto. Judgments and decrees, therefore, which are rendered in one state cannot of themselves affect title to lands in another. From the very nature of the property land must be governed by the *lex loci rei sitae*.

"But this does not mean that a decree directing a conveyance is without its effect *per se*. It may be pleaded as a basis or cause of action or defense in the courts of the state where the land is situated and is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud."

The foregoing cases show that at least since the year 1873 decrees for the conveyance of land have been regarded by our courts as *res judicata* and that if pleaded as a basis or cause of action or defense in the courts of other states, they are entitled to the force and effect of record evidence of the equities therein. This is true also if the action is brought in the state where the land in question is situated.

36. (1923) 64 Calif. App. 455, 459, 221 Pac. 973, 975.

I have omitted so far the cases of *Bullock v. Bullock*,³⁷ decided by the court of Errors and Appeal of New Jersey in 1894; *Fall v. Fall*,³⁸ decided by the Supreme Court of Nebraska in 1905, and affirmed in *Fall v. Eastin*,³⁹ *Mallette v. Scheerer*,⁴⁰ decided by the Supreme Court of Wisconsin, in 1916; and *Matson v. Matson*,⁴¹ decided by the Supreme Court of Iowa in 1919. These are divorce cases and I have grouped them apart in order that it might be apparent that the above doctrine has been fixed in our law without reference to statutes. If we leave out these divorce cases, it may be said that the cases without exception support the conclusion above stated.

The attempt has been made⁴² to differentiate these two groups of cases on the theory that the courts enforced in the first group not the decree but the original cause of action, the foreign decree being merely regarded as conclusive evidence of the existence of the duty to convey. In this way it is sought again to square these decisions with the notion that equitable decrees do not create rights. In reply it must suffice to say that although the duty to convey arose in the first class of cases from contract, partnership or some other consensual relation, what was enforced was not the original cause of action but the decree. If the decree is conclusive evidence of the defendant's duty, the defendant is bound by it, whether right or wrong. The merits of the original cause of action cannot be inquired into. In other words, if fact A (the original cause of action) is conclusively proved by fact B (the judgment), the operative fact is B and not A. The substantive rights of the parties must be clearly distinguished from mere matters of pleading. There is no escape from the conclusion, therefore, that in the above cases equitable duties to convey land created by the decree were recognized and enforced by the courts of other states, including those of the state in which the land was situated.

Let us turn our attention now to the second group of cases where the duty to act with reference to foreign land did not arise out of contract, partnership or some other consensual relation, but was imposed in connection with a decree for

37. (1894) 52 N. J. Eq. 561, 30 Atl. 676.

38. (1907) 75 Neb. 104, 113 N. W. 175.

39. (1909) 215 U. S. 1, 30 Sup. Ct. 3.

40. *Op. cit. supra* note 29.

41. *Op. cit. supra* note 30.

42. NOTES (1908) 21 HARV. L. REV. 210. Nor is it possible to reconcile *Mallette v. Scheerer* and *Matson v. Matson*, on the one hand, with *Bullock v. Bullock* and *Fall v. Fall*, on the other, on the ground that there was an antecedent obligation in the former and none in the latter. In all of these cases the duty imposed on the defendant existed under the local law of the forum and no reference was had to the law of the situs.

divorce. As *Mallette v. Scheerer* and *Matson v. Matson*⁴³ adopted the principle laid down in *Burnley v. Stevenson* and *Dunlap v. Byers*, which was followed also in the case of *Redwood Investment Co. v. Exley*, which cases have been discussed above, I shall not take the time to state them here. They are in accord with the view that decrees for the transfer of foreign land create equitable duties which will be recognized and enforced in other states, including the states in which the land is situated.

The two cases that must be considered at this point are *Bullock v. Bullock* and *Fall v. Fall* (*Fall v. Eastin*). The facts in *Bullock v. Bullock*⁴⁴ were the following: In a proceeding for divorce in New York, the court having jurisdiction over the parties, A obtained a decree granting her a divorce from her husband and alimony of \$100 a month. The decree further directed that B secure the payment of alimony by a mortgage on New Jersey lands. B failed to execute the mortgage and made various mortgages and conveyances of the lands in question without consideration for the purpose of defeating A's rights under the decree. A brought a suit in New Jersey, claiming an equitable lien on the New Jersey lands by virtue of the New York decree and praying that the mortgages and conveyances be set aside and that B execute a mortgage in accordance with the New York decree. On B's motion the suit was dismissed.

Magie, J., delivering the opinion of the court, said:⁴⁵

"But it is ingeniously contended in this court that the decree and order of the supreme court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation, as it would compel him to perform his contract to convey or mortgage lands in its jurisdiction. Moreover, it is contended that the provisions of section 1 of article 4 of the Constitution of the United States, requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, impart to this decree and order a conclusive force with respect to the mortgage directed to be given on lands here, which compels our courts to enforce it by decrees in conformity therewith.

"Doubtless the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus it has con-

43. For a discussion of these cases see Barbour, *op. cit. supra* note †; Goodrich, *Enforcement of a Foreign Equitable Decree* (1920) 5 IOWA L. BUL. 230; NOTES (1908) 21 HARV. L. REV. 210, 354; NOTES (1912) 25 *ibid.* 653; NOTE and COMMENT (1919) 18 MICH. L. REV. 142; COMMENTS (1917) 26 YALE LAW JOURNAL, 311.

44. *Loc. cit. supra* note 37.

45. *Supra*, note 37, at 566-567, 569.

clusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the direction to pay alimony, an indebtedness arises from time to time as such payments become due, an action at law would lie thereon and the decree would furnish conclusive evidence of such indebtedness.

"But the question, upon the solution of which this case must turn, is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other states, and, as was said by Chancellor Zabriskie in *Davis v. Headley*, *supra*, 'leave to the courts of this state only the ministerial duty of executing their decrees.' For the doctrine that jurisdiction respecting lands in a foreign state is not in rem but only in personam is bereft of all practical force if the decree in personam is conclusive and must be enforced by the courts of the situs. . . .

"The contention that such an order requiring lands in New Jersey to be charged with alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At the most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process."

Garrison, J., wrote a concurring opinion in which he took the position that the order to execute a mortgage on New Jersey land was not a part of the New York judgment upon the issue before the court but was a mere decretal order ancillary to execution.

Van Syckel, J., dissented, on the ground that the New York decree, although it did not of its own force create a lien upon the New Jersey lands, was conclusive of A's rights to have B execute a mortgage upon the New Jersey lands.

Five judges concurred with Magie and five with Van Syckel.

It should be noted that the judges in *Bullock v. Bullock* stood six to six on the issue before us and that Garrison, J., who cast the deciding vote, took a position which was not shared by any other judge.

The facts in *Fall v. Fall* ⁴⁶ were the following: Mrs. Fall got a decree of divorce from her husband in the state of Washington, the court having jurisdiction of the defendant. The court decreed also that certain property in Nebraska be set aside as her separate property and that Fall convey such property to

46. *Loc. cit. supra* note 38.

her. In default of performance by Fall, a commissioner of the court executed under the direction of the court a deed to such land to Mrs. Fall, who obtained possession of the land. Fall, having executed a mortgage and deed of the premises subsequent to the above decree to X, Mrs. Fall brought an action in Nebraska, setting up the Washington decree and the deed to her and prayed that the mortgage and deed by Fall to X be cancelled as casting a cloud on her title and that the title be quieted in her. Whether or not X had notice of the Washington decree does not clearly appear. The opinion in the case before the Supreme Court of the United States seems to proceed on the assumption that X had notice.

Relief was granted to Mrs. Fall, which was affirmed on appeal. On a rehearing, however, it was reversed. The court distinguished *Burnley v. Stevenson* on the ground that in the case before it title had been conveyed to a third party. In this connection, the court said:⁴⁷

"But we have yet been unable to find a single case in which the direct question at issue was whether or not a decree affecting the title to real estate lying in another state will be recognized in the state in which the land lies, where no conveyance has been made in obedience to the decree, and where the title has been conveyed to third parties."

It discussed also *Bullock v. Bullock*, with reference to which it made the following remarks:⁴⁸

"It will be seen, therefore, that neither the opinion of the majority or of the minority of the New Jersey court in *Bullock v. Bullock* would warrant the granting of the relief sought in this case, since the appellee is asking the court to give effect to a decree of the Washington court which it would not enforce if it had been rendered in a court of this state. . . .

"Under the laws of this state the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties. . . .

"We are not compelled (under the full faith and credit clause) to recognize a decree affecting the title of E. W. Fall and his grantees in an action where he is not in court by personal service, and where the act directed by the Washington court is in opposition to the public policy of this state in relation to the enforcement of the duty of marital support."

Upon writ of error to the Supreme Court of the United States the judgment in *Fall v. Fall* was affirmed.⁴⁹ Justices

47. At p. 128.

48. At p. 132, 133, 134.

49. *Fall v. Eastin*, loc. cit. *supra* note 39.

Harlan and Brewer dissented. Mr. Justice Holmes concurred specially. The majority opinion, written by Mr. Justice McKenna, is very unsatisfactory. This is perhaps accounted for by the fact that the court received no aid from counsel, the brief submitted on behalf of Mrs. Fall being very poor. No brief was filed for the defendant in error.

In the majority opinion the court dwells at length upon the inability of decrees in equity to convey legal title, a fact admitted on all sides, suggesting thereby that an *in rem* effect was claimed for the Washington decree. Calling attention to the fact that judgments at law can be enforced in another state only by a new suit, the court said:⁵⁰

"Plaintiff seems to contend for a greater efficacy for a decree in equity affecting real property than is given to a judgment at law for the recovery of money simply."

The real issue, as has been stated, is whether or not the decree of equity shall be regarded as having created an equitable obligation which may be enforced elsewhere by a new suit, similarly to a foreign judgment.

Although *Burnley v. Stevenson* was deemed by the court to be opposed to the weight of authority relating to foreign equitable decrees, the opinion states that there was much temptation in the facts of this case to follow the ruling of the Ohio court. The court felt constrained, however, to affirm the Nebraska decree because of the ruling of the latter court "that the decree in Washington gave no such equities as could be recognized in Nebraska as justifying an action to quiet title." Such a ruling, it concluded, did not offend the constitution of the United States. The concurring opinion of Mr. Justice Holmes will be noticed later.

Bullock v. Bullock, *Fall v. Fall*, and *Fall v. Eastin* are the principal cases relied upon in support of the proposition that a decree for the doing of something other than the payment of money does not create a right-duty relation, an obligation, which can be enforced in another state. Attention has been called already to the fact that in *Bullock v. Bullock* only six judges supported this view, whereas six favored the enforcement of the New York decree. The decision resulted from the vote of Garrison, J., who held that the order to execute a mortgage was not a part of the decree proper but was ancillary to execution.⁵¹ Notwithstanding this, the case is relied upon prin-

50. At p. 12.

51. It is also noteworthy that a foreign decree has been enforced in New Jersey where it did not relate to New Jersey land. *Bennett v. Piatt* (1915) 85 N. J. Eq. 436, 96 Atl. 482. To the same effect see *Fromholz v. McGahey*, *supra* note 18.

cipally by those favoring the orthodox view as supporting their position.⁵²

The opinion in *Fall v. Fall* accepted neither the views of Magie, J., in *Bullock v. Bullock* nor those of Van Syckel, J., and rested its conclusion mainly upon the ground that the recognition and enforcement of the Washington decree would violate the policy of the state. The Supreme Court of the United States also failed to take a definite stand with reference to the issue here considered.

Notwithstanding the great weight of authority in favor of the proposition that equitable decrees for the doing of something other than the payment of money create equitable obligations which can be enforced by the courts of other states, the orthodox view continues to be advocated by a certain group of writers. In a leading law review, the following statement appeared in 1912:⁵³

"Thus a decree to execute a mortgage in a foreign jurisdiction will not be enforced at the *situs* of the land. The rule that jurisdiction respecting foreign land is only *in personam*, is bereft of all practical force if the decree must be enforced by the court of the *situs*. Such a decree would really accord jurisdiction over its lands to a foreign court. The most serious objection is that there is no form of procedure for enforcing the personal decree of a court of equity except by order of the court rendering it. The decree is in its nature not the establishment of an obligation, but a method of enforcing an obligation—a mere form of execution."

One of our most eminent authors, writing in 1920, says:⁵⁴

"If we are to allow a court of equity in New York to create duties to convey New Jersey land, to-day when a duty to convey land, specifically enforceable in equity, in effect, and very generally in theory involves an equitable ownership capable of assertion against the whole world, unless and until cut off by conveyance to a purchaser for value without notice, the result is to allow one state through its courts to create real rights in land in another state—and if it may do so by its courts, why not through its legislature?"

In the extract first given we meet again the notion that a decree imposing upon the defendant the duty to execute a mortgage on land in another state is not, in its nature, the establishment of an obligation, but a method of enforcing an obligation, a mere form of execution. In the light of what has been stated,

52. See 3 Beale, *loc. cit. supra* note 7.

53. NOTES (1912) 25 HARV. L. REV. 653, 654.

54. Pound, *op. cit. supra* note 8, 424-425.

it must be apparent that the duty imposed to execute a mortgage creates an equitable right in plaintiff's favor. The objection that we have no form of procedure to enforce the personal decree of a court of equity, except by order of the court rendering it, is of course no argument at all. It is true, of course, that Anglo-American law never does enforce foreign judgments or decrees as such. Process will not issue upon them in another jurisdiction. A new suit must be brought in every instance. All that is asked in the case before us is, however, that just as an action at law lies to enforce a legal obligation created by a foreign judgment, so a bill in equity or some equivalent mode of procedure shall be recognized as available to enforce an equitable obligation created by a foreign decree in equity. As equitable decrees create in modern law equitable rights there is no inherent reason why they should not be enforced elsewhere.

The real basis for the objection to the enforcement of foreign equitable decrees for the doing of something other than the payment of money arises from the feeling that such a recognition is equivalent to allowing the courts of another state to create property rights in domestic land. Because of this, the old dogma is persisted in that equitable decrees in the absence of statute do not create obligations at all, but are only in the nature of process or execution. We have seen, however, that the great weight of modern authority is to the contrary and that the whole history of the relation between equitable decrees and judgments at law unmistakably points to the conclusion that they differ to-day, not as regards their essential nature and effect, but only as regards the remedy by which the legal and equitable obligations are respectively enforced.

What is there to the contention that the recognition of a foreign equitable decree for the conveyance of land or for the giving of a mortgage would be tantamount to a surrender to a foreign court of the power to control title to local real property?

In *Taylor v. Taylor*, decided by the Supreme Court of California in 1923, it is said:⁵⁵

"That the courts of one state cannot make a decree that will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction, must be conceded . . . Jurisdiction to affect the title to real property by a judgment in rem, or directly against the thing itself, exists only in the courts of the state where the land is situated."

Such and similar statements are found in numerous decisions and are said to represent fundamental principles in our law.

55. (1923) 192 Calif. 71, 76, 218 Pac. 756, 758.

That being so, would the doctrine that jurisdiction with respect to land in another state is not *in rem* but only *in personam* be deprived of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the situs? What do the above statements actually mean? Let us see what happens if a defendant in the equitable suit, coerced by the order of the court, executes the conveyance or mortgage. Why, it is binding in our law at the situs and cannot be set aside on the ground of duress.⁵⁶ But for the power or jurisdiction of the court of equity to affect the title to the foreign land, the conveyance would be annulled. No greater effect is given to the decree when it is recognized by the courts of the situs as a conclusive determination of the defendant's duty to convey. So far as the defendant is concerned, the effect is identical; namely, he is deprived of his land, and as regards the control of the situs over domestic land, it is also identical in substance. Where the defendant makes the conveyance under the compulsion of the foreign court, plaintiff's legal title to the land is established by the deed executed in conformity with the law of the situs. Where the foreign decree is made the basis of a new suit at the situs, the legal title to the land is established by the new decree. The difference is one of form or procedure, not one of substance.

As long as the power of foreign courts of equity exists in our law to coerce defendants to do their bidding with respect to foreign land, logic requires, unless there are reasons of policy to the contrary, that the duties imposed on the defendant be recognized and enforced at the situs if the defendant has succeeded in extricating himself from the clutches of the foreign court by moving to the state where the property lies before being coerced to execute the deed or mortgage. The general policy that litigation should cease and that the same issues should not be tried again between the same parties applies here with as much force as elsewhere.

Some one may ask: May it not happen that the foreign court of equity would determine the duty of the defendant to make the conveyance in accordance with some other law than that of the situs and that the courts of the situs would be bound, therefore, to enforce such duty, although no such duty would have existed under the local law of the situs? Yes, this may happen, but this is true also when the defendant is coerced by a court of equity to execute the conveyance. Where such a conveyance is made the courts of the situs do not look behind the foreign decree, to see whether the duty to convey was "created" with ref-

56. *Gilliland v. Inabnit* (1894) 92 Iowa, 46, 60 N. W. 211; *Groom v. Mortimer Land Co.* (1912, C. C. A. 5th) 192 Fed. 849; *Putnam & Norman v. Conner* (1918) 144 La. 231, 80 So. 265.

erence to some other law than that of the situs. The same would be true, of course, if the foreign decree is recognized as furnishing the basis for a new suit at the situs. The policy on which the doctrine of *res judicata* rests precludes an inquiry into the merits of the issues determined by the court.

The fundamental rule in Anglo-American law that the title to land is controlled by the law of the situs, however true it may be in general, does not mean, therefore, that all personal obligations with reference to foreign land, even if they are specifically enforceable, must be determined in accordance with the law of the situs. This appears also from a decision of Mr. Justice Holmes in *Polson v. Stewart*,⁵⁷ in which the following were the facts: A and B entered into an agreement in state X, with respect to real property in state Y. The contract was valid under the law of state X but would have been void if entered into in state Y. Suit for the specific performance of the contract was brought in state Y. The decision in the case was that inasmuch as what the contract called for could be done consistently with the law of the situs, specific performance should be granted. In this case, therefore, a court of the situs enforced specifically a personal duty with respect to domestic land, although such a duty could not have been created if the agreement had been made in the state where the land was.

Unless we are ready, therefore, to abandon the doctrine of this case, as well as the established doctrine that conveyances executed under the coercion of a foreign court of equity, are valid and unimpeachable in the state where the land is situated, it would seem but good sense to give the same effect to a foreign decree of equity where the defendant has escaped before complying with the decree. This is not giving an *in rem* effect to the equitable decree. By specifically enforcing the duty created by the foreign decree, the legal title is affected only indirectly. The title will not be changed except as the result of a decree of the court of the situs, that is, only after there is record evidence of such change at the situs and this is the only real interest that the state of the situs has in the matter. As has been stated above, its control over the title to domestic land is no greater and no less whether the change of legal title results from the recognition of the obligation created by the foreign decree, which is specifically enforced by the courts of the situs, or from a deed executed by the defendant in the foreign suit under coercion, or from the recognition of a personal duty to convey created by a contract in another state, which is specifically enforced by the courts of the situs, although such obligation

57. (1897) 167 Mass. 211, 45 N. E. 737.

would not have resulted from the contract if it had been entered into in the state where the land is.

If a foreign contract or a foreign decree should go beyond what was ordered in the cases that have been discussed in this article, that is, if it should impose upon the defendant not merely a duty to convey land in accordance with the law of the situs, but the duty to execute a deed not satisfying the law of the situs as regards form or substance, the deed would be inoperative to pass the title to the land. Each state has the power to determine the conditions upon which title to land shall be held, and the mode by which legal title shall be conveyed,⁵⁸ and it is not bound to recognize a foreign decree or deed executed in compliance with such a decree if it violates its policy in these respects.

Here it may be asked: Was the Supreme Court of Nebraska not justified then in declining to give effect to the Washington decree on grounds of policy? The policy referred to in this question is not the kind of policy just discussed. If the deed ordered to be executed by the Washington decree had been made, there would have been nothing in the law of Nebraska to prevent its recognition. No rule of property of the state would have been violated. The policy involved in the question has, therefore, nothing to do with the power of the state to determine the title to Nebraska land, but related to the power of the Nebraska court to determine the property rights of the parties in divorce proceedings. As the Nebraska court, according to the view taken by the majority, had no power under the local legislation to impose a duty upon Mr. Fall to make a conveyance of land to Mrs. Fall when granting her a divorce, it was of course within its power to say that the recognition of the Washington decree was inconsistent with the policy of the state, provided the personal obligation created by the Washington decree was not entitled to recognition in Nebraska under the full faith and credit clause. If it did fall within the constitutional provision referred to, the defense of public policy would not avail under the decision of the Supreme Court of the United States in *Fauntleroy v. Lum*.⁵⁹

This brings us to the final question: Is the equitable duty to convey foreign land created by a court of equity within the full faith and credit clause of the constitution of the United States? Let us see what Mr. Justice Holmes has to say on this subject in his concurring opinion in *Fall v. Eastin*.⁶⁰

58. *United States v. Crosby* (1812) 7 Cranch, 115, 3 L. Ed. 287.

59. (1908) 210 U. S. 230, 28 Sup. Ct. 641.

60. *Supra* note 39, at pp. 14-15.

"The real question concerns the effect of the Washington decree. As between the parties to it that decree established in Washington a personal obligation of the husband to convey to his former wife. A personal obligation goes with the person. If the husband had made a contract, valid by the law of Washington, to do the same thing, I think there is no doubt that the contract would have been binding in Nebraska. . . . So I conceive that a Washington decree for the specific performance of such a contract would be entitled to full faith and credit as between the parties in Nebraska. But it does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else. *Fauntleroy v. Lum*, 210 U. S. 230. (In this case it may have been that the wife contributed equally to the accumulation of the property, and so had an equitable claim.) A personal decree is equally within the jurisdiction of a court having the person within its power, whatever its ground and whatever it orders the defendant to do. Therefore I think that this decree was entitled to full faith and credit in Nebraska.

"But the Nebraska court carefully avoids saying that the decree would not be binding between the original parties, had the husband been before the court. The ground on which it goes is that to allow the judgment to affect the conscience of purchasers would be giving it an effect in rem. It treats the case as standing on the same footing as that of an innocent purchaser. Now if the court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong. I do not see why it is not within the power of the state to do away with equity or with the equitable doctrine as to purchasers with notice if it sees fit. Still less do I see how a mistake as to notice could give us jurisdiction. If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by the obligation imposed by equity upon a purchaser with notice. The ground of decision below was that there was no such obligation. The decision, even if wrong, did not deny to the Washington decree its full effect."

It is submitted that Mr. Justice Holmes has given us the key to the final solution of our problem, which will reconcile the interests of society in enforcing rights that have been decided after a fair hearing upon the merits and not allowing them to be relitigated and the interests of a state to control the title to domestic land. And this solution is briefly the following: the foreign decree is entitled to be enforced under the full faith and credit clause as between the immediate parties, but that the state in which the property is situated may decline to give effect to it as to third parties, including purchasers with notice of the foreign decree. It must be remembered, however, that the question is ultimately whether, in view of the mischief that the full faith and credit clause was designed to prevent, equitable de-

crees for the conveyance of foreign land should be regarded as within the purview of the constitutional provision.

The courts of the situs may of course give effect to the foreign decree, even as to third parties with notice thereof, and such effect has actually been given to them in the later cases. (*Mallette v. Scheerer*, *Matson v. Matson*, *Redwood Investment Co. v. Exley*, *supra*.)

The conclusion reached in this paper may be summarized as follows:

(1) Equitable decrees for doing something other than the payment of money create equitable rights. They do not impose merely a personal duty on the defendant with respect to the particular court, nor are they mere methods of enforcing an obligation, a form of execution.

(2) The equitable rights created by foreign decrees should, as between the parties, be recognized and enforced elsewhere, including the state in which the land lies, similarly to foreign judgments at law. That is: (a) The foreign decree may be pleaded as *res judicata*. (b) When the decree is in plaintiff's favor, the cause of action is merged, so that plaintiff cannot fall back on the original cause of action. (c) The obligation created by the decree may be enforced elsewhere by a new suit or may be set up, where the local law allows it, as an equitable defense.

(3) Under the full faith and credit clause, the obligation imposed by a foreign decree is, as between the parties, binding upon the courts of sister states. It is not binding, however, under the federal constitution upon third parties including parties with notice of the foreign decree. Whether foreign equitable decrees will be recognized by the courts of the situs as to such third parties will depend upon the policy of the particular state.

It is submitted that the foregoing conclusions are more in harmony with the historical development of equity than would have been the recognition of a fundamental difference between judgments at law and equitable decrees in our law to-day. The question how far the similarity should be carried depends, of course, upon considerations of social order. From a legalistic viewpoint, it would have been perfectly proper to draw a distinction between equitable decrees for the payment of money and equitable decrees for the doing of some other act. It is obvious, on the other hand, that there is no inherent difference in the nature of the two kinds of decrees. If a distinction were to be drawn between them, it must be because of a difference in the underlying social considerations. Now, it may be argued that the social need was satisfied when equitable decrees for the payment of money were placed on the same footing as judg-

ments at law, and most of the supporters of the orthodox view take this position. The ultimate question to be decided is, therefore, whether considerations similar to those which prompted the forward step as regards equitable decrees for the payment of money do not demand the same recognition for foreign equitable decrees for the conveyance of land? Two courses are open. Policy may suggest that all litigation affecting land should take place in the tribunals of the state in which the land is situated. Such a rule no doubt would give the greatest guarantee that all rights in such land would be determined in accordance with the law of the situs. In many cases, however, it would impose on one or both of the parties the inconvenience and expense of conducting litigation away from home. For this and other reasons, Anglo-American law has conferred upon courts of equity jurisdiction with respect to foreign land, provided personal service is had over the defendant. As long as this policy stands, the writer is satisfied that the recognition and enforcement of foreign equitable decrees for the conveyance of land is a desirable end. As between the courts of this country, as much effect should be given to judgments or decrees of a sister state, apart from the requirements of the full faith and credit clause, as is consistent with the interests of the forum. In view of the fact, therefore, that a conveyance of domestic land, made under the compulsion of a decree of a court of equity of another state, will be recognized, it seems but logical and just that the same recognition should be given to the decree where the defendant left the state without complying therewith. Defendant has had his day in court and there is no reason why he should be allowed to litigate the matter over again simply because he was successful in evading the duty imposed upon him in the original suit.

19. COMMERCIAL ARBITRATION—INTERNATIONAL AND INTERSTATE ASPECTS*

I

HISTORICAL INTRODUCTION

ENGLAND.¹ The development of commercial arbitration in England was particularly affected by a dictum of Lord Coke in *Vynior's Case*,² decided in 1609, where plaintiff was permitted to recover on a bond given for the faithful performance of an arbitration agreement. Lord Coke explained that where there is an agreement to submit to arbitration, a party "might countermand it, for a man cannot by his act make such authority, power, or warrant not countermandable which is by the law and of its nature countermandable"; but the bond is thus forfeited because the condition of the bond is broken by such revocation. With the enactment of the Statute of Fines and Penalties,³ in 1697, the use of a bond in submission was no longer effective, but the fact that the method of making the agreement effective had been abrogated did not induce the courts to abandon the revocability rule. There resulted the irrational situation that a valid agreement was utterly ineffective, for the courts would give only nominal damages for breach of

* (1934) 43 Yale Law Journal 716.

1. The following abbreviations are used:

BLUE BOOK: Reports from the Governments in the British Self-Governing Dominions and His Majesty's Representatives in Foreign Countries as to the Enforcement of British Arbitration Awards. (London, 1912.)

CLUNET: JOURNAL DE DROIT INTERNATIONAL PRIVÉ.

NUSSBAUM: INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESSEN IN ZIVIL—UND HANDELSACHEN, vols. 1-3 (1926, 1928, 1931). The first volume has been translated into English and the references in that volume are to this translation. (Oxford Univ. Press, N. Y. 1928).

REVUE: REVUE DE DROIT INTERNATIONAL PRIVÉ.

2. 8 Co. 80a and 81b; also reported in 1 Brownlow & Goldesborough 64, and 2 Brownlow & Goldesborough 290. There appear to have been English cases involving arbitration much earlier than *Vynior's case*. For a detailed study of the origin of the doctrine of revocability see COHEN, *COMMERCIAL ARBITRATION AND THE LAW* (1918) c. 8, 9; Sayre, *Development of Commercial Arbitration* (1928) 37 YALE L. J. 595.

At the time that Coke announced the doctrine, there appears to have been no hostility to arbitration agreements, for recovery on the bond—the usual and almost invariable method at that time for insuring performance of any agreement, the entire law of contracts being in its infancy—was available. See Sayre, *supra*, at 603; COHEN, *op. cit. supra*, at 92.

3. 8 & 9 Wm. III, c. 11 (1696-97).

the agreement on the theory that there could be no actual injury in forcing people to litigate in the King's own courts of justice. The view that courts cannot approve irrevocability of arbitration agreements because it "ousts the jurisdiction of the court" did not appear in the early cases, and is not to be found until the case of *Kill v. Hollister*,⁴ decided in 1746. It was created perhaps to justify the maintenance of the revocability rule which could no longer be mitigated by the use of bonds after the passage of the Statute of Fines and Penalties.⁵ The doctrine has also been credited to the judicial jealousy of the English courts, whose judges and court officers in early times were paid by fees on the volume of business which came to them.⁶

The English Parliament and courts started early to modify this situation. The first arbitration act, passed in 1698,⁷ provided that the parties might agree to make their submission agreement a rule of court, whereby the party who revoked should be subject to imprisonment for contempt of court. However, this did not prevent the parties from revoking the authority of the arbitrator at any time before an award was made. In 1833, however, it was provided⁸ that where the submission agreement had been made a rule of court under the Act of 1698, the authority of the arbitrators appointed should be irrevocable, except by leave of court, and the arbitrators might proceed to make a binding award. The Common Law Procedure Act of 1854⁹ further provided that any agreement of submission to arbitration by consent could be made a rule of court, unless the parties expressly agreed to the contrary. Power was also given to the court to stay the proceedings in an action brought contrary to the agreement, and to appoint an arbitrator where there was a failure of appointment according to the agreement of the parties. The Arbitration Act of 1889¹⁰ completed the effectiveness of arbitration agreements. Under this Act agreements to refer disputes to arbitration voluntarily, whether the disputes be existing ones or future ones, are given full effect, subject to certain general powers of control and supervision by the courts. Section 4 of the Act provides for a stay of legal proceedings where one party to the agreement brings an action at law despite the agreement and the court is "satisfied that there is no sufficient reason why the matter should not

4. 1 Wils. K. B. 129 (1746).

5. See Sayre, *supra* note 2, at 604.

6. See COHEN, *op. cit. supra* note 2, 253 *et seq.*; Sayre, *supra* note 2, at 609.

7. 9 WM. III, c. 15 (1698).

8. 3 & 4 WM. IV, c. 42 (1833).

9. 17 & 18 VICT. c. 125, §§ 3-17 (1854).

10. 52 & 53 VICT. c. 49 (1889).

be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration.”¹¹ Section 5 gives the court power to appoint an arbitrator, umpire or third arbitrator in certain cases where there has been refusal to appoint or failure of appointment. Section 6 further provides that, unless the agreement shows a contrary intention, the parties may themselves supply vacancies caused by death of an arbitrator or refusal by an arbitrator to act; or where one party fails to make his appointment of an arbitrator according to the agreement, the other party may authorize his appointee to act as sole arbitrator, whose award shall be binding on both parties.

It should be noted that the English acts have always covered both present and future disputes. The early statutes contained detailed provisions governing the manner of the submission and the regulation of the proceedings which had to be complied with in order to obtain the advantages of the statute. On the other hand, the statute of 1889 is very liberal in presuming every arbitration agreement to be within the statute, and provides only in general terms for regulation of proceedings.

Meanwhile the courts also had been busy loosening the shackles upon arbitration agreements. The revocability rule, as has been seen, dissolved early into the public policy doctrine against ousting courts of jurisdiction, and, in 1855, in the case of *Scott v. Avery*,¹² the application of this doctrine to arbitration agreements was recognized as irrational and inequitable where the agreement was open to the interpretation that the arbitration was only a condition precedent to resort to the courts. That case held that an agreement not to resort to the courts of law or equity until after an arbitral determination of the claims of the parties was sound policy and did not oust the courts of jurisdiction, but merely established a valid “condition precedent” to jurisdiction. Even the whole question of liability under the contract may be determined in England at common law if put in the form of a condition precedent.¹³

United States. Common-law arbitration in the United States followed the more reactionary steps of the English development. *Vynior's Case* and *Kill v. Hollister*, or at least *Scott v. Avery*,¹⁴ narrowly interpreted, have been the favorites. Arbi-

11. The application of the stay must be made “at any time after appearance and before delivering any pleadings or taking any other steps in proceedings.”

12. 5 H. L. Cas. 811 (1856).

13. 3 WILLISTON, CONTRACTS (1920) 3010.

14. In many states of this country agreements to arbitrate the whole question of liability are ineffectual even though expressed in the form of a condition precedent, whereas agreements providing merely for the de-

tration agreements, whether to submit future disputes or existing disputes, are regarded almost universally in our common-law cases as revocable. A party can terminate the agreement either by giving notice of revocation or by bringing an action at law in disregard of it. The reason given by the great majority of courts is the old doctrine of *Kill v. Hollister* against ousting the courts of jurisdiction. An action for breach of a common-law agreement to arbitrate an existing dispute was generally allowed, but the damages were ordinarily only nominal.¹⁵

Many states have long had legislation making irrevocable and enforceable agreements to submit existing disputes to arbitration.¹⁶ These statutes, however, are strictly limited to agreements which conform to detailed regulations. The agreement must be in writing and generally there is provision that the submission be made "an order of court" by filing the agreement with the clerk of court. There are also requirements in more or less detail regarding parties who can submit under the statute, causes which can be settled by such arbitration, execution of the agreement, conduct of the arbitral hearing, and enforcement or impeachment of the award.

Agreements to arbitrate future disputes were, until 1920, almost completely left in the realm of the "revocability rule." Pennsylvania seems to have stood alone in recognizing such agreements as enforceable at common law, and in Pennsylvania they were irrevocable only where the arbitrators were named or designated.¹⁷ Even at the present time the great majority of states have done nothing to change the revocability rule in regard to such agreements. The Draft State Arbitration Act, sponsored by the American Arbitration Society, and first adopted in New York in 1920,¹⁸ repudiates the rule with respect

termination of a particular fact are effective. WILLISTON, *op. cit. supra* note 13, at 3012. See also Note (1923) 26 A. L. R. 1077.

15. WILLISTON, *op. cit. supra* note 13, at 3009; STURGES, *COMMERCIAL ARBITRATIONS* (1930) 253-262.

With reference to the breach of future disputes clauses, Sturges says: "Statements also frequently appear to the effect that a party who is aggrieved by the breach of such an agreement can maintain an action for damages. So few cases, however, have involved such assertion that if there is such a rule of law it rests upon this popular acclaim." STURGES, *op. cit. supra*, at 82.

16. See STURGES, *op. cit. supra* note 15, at 263 *et seq.*

17. See *id.* at 48-50. In recent years the Supreme Courts of Washington and Colorado have rejected the revocability rule with respect to future disputes clauses in written contracts, although the arbitration statutes of these states do not expressly embrace future disputes. *Id.* at 505.

18. N. Y. CONSOL. LAWS (Cahill, 1930) c. 2. See Popkin, *Judicial Construction of the N. Y. Arbitration Law of 1920* (1926) 11 CORN. L. Q. 329; Fraenkel, *The New York Arbitration Law* (1932) 32 COL. L. REV. 623.

to all arbitration agreements (whether to submit existing or future disputes) and declares the agreements to be irrevocable from date of execution without the necessity of filing in any court. Provision is made for stay of trial in an action at law on issues referable to arbitration by the agreement of the parties, and a method is provided for specifically enforcing the agreement where one of the parties refuses to proceed to arbitration. An order from the state supreme court, or a judge thereof, may be procured directing the parties to proceed with the arbitration in accordance with the terms of their contract. If a party refuses to appoint an arbitrator or arbitrators, the court, or an individual judge, may, upon application, make the necessary appointment.¹⁹ The New York statute has been substantially followed or copied by a number of other states.²⁰ The United States Arbitration Act,²¹ in force since January 1, 1926, relating to controversies concerning matters arising in admiralty and in foreign and interstate commerce, exclusive of most contracts of employment, also follows closely the New York Act.²²

Continental Countries. In Roman law existing disputes might be arbitrated (*compromissum*), but no effect was given to agreements to submit future disputes to arbitration.²³ This

19. Such an appointment cannot be made *ex parte*. In this case, as in the case of a motion to compel, personal service within the state is required.

20. ARIZ. CODE (Struckmeyer, 1928) c. 93, art. 1, amended by Laws 1929, c. 72; CAL. CODE CIV. PROC. (1931) §§ 1280-93; CONN. GEN. STAT. (1930) §§ 5840-56; LA. GEN. STAT. (1932) §§ 405-22; N. H. PUB. LAWS (1929) c. 147; N. J. LAWS (1923) c. 134; OHIO GEN. CODE (Page, 1932) § 12148 (1-17); ORE. CODE ANN. (1930) §§ 21-101 to 21-113, LAWS 1931, c. 36; PA. STAT. ANN. (Purdon, 1930) tit. 5, §§ 161-181; R. I. PUB. LAWS (1929) c. 1408, §§ 1-18; WIS. STAT. (1931) §§ 298.01-298.18. See also MASS. GEN. LAWS (1932) c. 251.

Nevada, North Carolina, Utah and Wyoming have adopted the Uniform Arbitration Act, recommended by the National Conference of Commissioners on Uniform State Laws. This act does not provide for specific performance and applies only to agreements to submit existing disputes. NEV. COMP. LAWS (Hillyer, 1929) §§ 510-34; N. C. CODE (1931) §§ 898(a)-898(x); UTAH REV. STAT. (1933) tit. 104, c. 36, §§ 1-22; WYO. REV. STAT. ANN. (1931) c. 7, §§ 7-101 to 7-124.

For a thorough discussion and annotation of all arbitration statutes of this country, see STURGES, *op. cit. supra* note 15.

21. 43 STAT. 883 (1925), 9 U. S. C. §§ 1-15 (1926).

22. Of importance from an international point of view are the Court of Commercial Arbitration of the International Chamber of Commerce and the arrangements for arbitration made between the Chamber of Commerce of the United States and the Chambers of Commerce of some of the most important Latin-American cities. See Jones, *Historical Development of Commercial Arbitration in the United States* (1928) 12 MINN. L. REV. 240.

23. Roman law, it seems, never gave effect to agreements to submit future disputes. The *compromissum* required that the arbitrators should

attitude was maintained by the canon law.²⁴ The old Germanic law, on the other hand, is said to have recognized the binding nature of agreements to submit future disputes to arbitration, granting a stay of proceedings where a party resorted to the courts in violation of such agreement.²⁵ After the reception of the Roman law in Germany the Roman-canonical *compromissum* displaced the Germanic rules for the most part, and arbitration became thus limited to existing disputes. With the development of territorial sovereignty during the seventeenth and eighteenth centuries and the growing jealousy of the ordinary courts with respect to arbitral procedure, the practice of submitting disputes to arbitration practically disappeared. It was allowed by the Judicial Codes of Bavaria (1753) and of Prussia (1794),²⁶ but the restrictions which had impeded the development of arbitration in Germany were not effectively removed until the enactment of the German Code of Civil Procedure in 1877²⁷ permitting agreements for the submission of future disputes and authorizing the courts to appoint arbitrators where the parties failed to do so.

The French law of arbitration was, until 1925, based wholly upon Article 1006 of the French Code of Civil Procedure. This Code has had a considerable influence upon the law of other countries, without being instrumental, however, in advancing the cause of arbitration. It requires that the agreement to arbitrate must designate the objects in dispute and the names of the arbitrators, thus limiting the validity of such agreements to existing controversies.²⁸ Unlike American courts, the French did

be appointed at the time of the agreement. Such agreement to submit existing disputes to arbitration was not enforceable in classical times; nor was an award. Notwithstanding such an agreement or award, the parties could bring the case before the ordinary courts, which were without power to grant a stay of trial or to compel the opposing party to proceed with the arbitration. If a penalty had been agreed upon in case of breach, such penalty could be recovered, but until the time of Justinian that was all. Justinian provided for the enforcement of an award, if it was accepted in writing or if the parties allowed ten days to pass by without notice of repudiation. BUCKLAND, *TEXTBOOK ON ROMAN LAW* (2d ed. 1932) 532.

24. KRAUSE, *DIE GESCHICHTLICHE ENTWICKELUNG DES SCHIEDSGERICHTSWESENS IN DEUTSCHLAND* (1930) 50; *ENTWICKELUNGSLINIEN DES DEUTSCHEN SCHIEDSGERICHTSWESENS*, 3 NUSSBAUM 229.

25. KRAUSE, *op. cit. supra* note 24, at 39; see also Krause, 3 NUSSBAUM 227.

26. KRAUSE, *op. cit. supra* note 24, at 84; see also Krause, 3 NUSSBAUM 236.

27. KRAUSE, *op. cit. supra* note 24, 114 *et seq.*; see also Krause, 3 NUSSBAUM 236 *et seq.*

28. The only exception to the rule was contained in Article 332 of the Commercial Code, where the arbitration of future disputes is expressly sanctioned in matters of marine insurance.

not regard the requirements thus laid down as "procedural" or "remedial" in their nature, so as to be applicable to foreign agreements, nor did they, in the end, consider them as constituting rules of international public order (public policy), which would prevent the recognition of all foreign agreements for the arbitration of future disputes. The arbitration of future disputes, limited to contracts between merchants or to contracts having a commercial character, was authorized in France by the law of December 31, 1925.²⁹

Of the other continental countries, many have followed the German example in allowing the arbitration of future disputes, while some continue to have provisions similar to those of Article 1006 of the French Code of Civil Procedure.

Latin-American Countries. In Latin-America little interest has been manifested thus far in the subject of arbitration, the result being that no modern arbitration statutes are to be found in any of the leading countries. Brazil regulates the matter of arbitration in its Civil Code of 1917, but according to a decision of the Supreme Court of the state, agreements for the submission of future disputes to arbitration are still invalid.³⁰ Argentina³¹ has in its Code of Civil Procedure provisions similar to Article 1006 of the French Code of Civil Procedure, so that agreements for the submission of future disputes to arbitration must be regarded as invalid. In the other Latin-American countries provision is likewise made for the submission of existing disputes only.³²

II

COMPARATIVE LAW

Scope of Arbitration Agreements. Section 1026 of the German Code of Civil Procedure provides that "An arbitral agreement concerning future disputes is not effective if it does not refer to a definite legal relationship and the legal disputes arising therefrom."³³ An agreement, therefore, that all disputes arising between the parties from their business relations shall be submitted to arbitration would be invalid. On the other hand, a provision that all disputes arising under a specific con-

29. See André-Prudhomme, *The Present Position of the Arbitration Clause under the Law of France*, 1 NUSSBAUM 70.

30. See Valladão, *Die Schiedsgerichtsbarkeit in Zivil- und Handels-sachen in Brasilien*, 3 NUSSBAUM 59.

31. Art. 770.

32. See ESQUIVEL OBREGÓN, *LATIN-AMERICAN COMMERCIAL LAW* (1921) 798.

33. So also some cantons of Switzerland. See Fritsche, *Schiedsgerichte in Zivilsachen nach schweizerischem Recht*, 2 NUSSBAUM 56.

tract of partnership shall be settled by arbitration is valid.³⁴

Formal Requisites. At common law no formalities were required for the validity of a submission to arbitration, except where the case fell within the statute of frauds. Statutory submission agreements, however, are generally required to be in writing and in many instances have to be acknowledged or made a rule of court.³⁵ The modern statutes authorizing the submission of future disputes, which are based on the Draft State Arbitration Act, invariably demand the agreement be in writing. In England the submission must be in writing in order to come under the Arbitration Act of 1885; an oral submission is generally valid, but can be revoked at any time prior to the award.³⁶ The Act does not require a formal document nor need all the terms be contained in the same document; an exchange of letters is sufficient.³⁷ It is yet to be determined whether an arbitration agreement, signed by one party only, as in buyers' and sellers' orders, invoices and confirmations or insurance policies, is sufficient under the United States statutes relating to the arbitration of future disputes.³⁸

Continental countries are somewhat divided on the question of whether a writing should be required for the validity of agreements for arbitration. In some countries a document signed by both parties is required.³⁹ In others an exchange of letters is sufficient.⁴⁰ Sometimes the requirement of a writing is deemed waived if the parties proceed with the arbitration.⁴¹ In some countries the agreement may be oral.⁴² In Germany either party has the right to have it reduced to writing;⁴³ compliance must then, it seems,⁴⁴ be had with Section 126 of the German Code which provides that "If a writing is prescribed by law . . . the signatures of the parties must be attached to

34. Mittelstein, *Law and Practice of Arbitral Tribunals in Germany*, 1 NUSSBAUM 35.

35. STURGES, *op. cit. supra* note 15, at 218-225.

36. RUSSELL, *ARBITRATION AND AWARD* (12th ed. by V. R. Aronson, 1931) 336.

37. *Id.* at 326-327.

38. STURGES, *op. cit. supra* note 15, at 95.

39. POLAND, CODE CIV. PROC. art. 487, 3 NUSSBAUM 266.

40. Hungary (See Fabinyi, *Schiedsgerichte nach ungarischem Recht*, 3 NUSSBAUM 40); Italy (See Ascarelli, *Arbitration under Italian Law*, 1 NUSSBAUM 80); Norway (See Knoph, *Die norwegischen Gesetzesbestimmungen über Schiedsgerichtswesen*, 2 NUSSBAUM 16).

41. E.g., in some cantons of Switzerland. See Fritsche, *supra* note 33, at 56.

42. E.g., Sweden, Arbitration Law of June 14, 1929, art. 1; and some cantons of Switzerland, Fritsche, *supra* note 33, at 57.

43. GERMANY, CODE CIV. PROC. § 1027.

44. Mittelstein, *supra* note 34, at 38.

the same document. If several identical copies of the same contract are drawn up, it is sufficient if each party signs the copy intended for the other party." Purchase orders, letters of confirmation, or even an exchange of letters would not satisfy this requirement.

In Latin-America submission agreements are required to be executed in a public instrument.⁴⁵

Parties Competent to Submit. At common law neither married women nor infants⁴⁶ had the power of submitting their disputes to arbitration, but under modern legislation the former can generally bind their separate property as freely as can a feme sole. On the continent and in Latin-America, a married woman's capacity to enter into a valid contract of arbitration may depend upon her husband's authorization. If she is authorized to engage in business, she would have the capacity to enter into contracts of arbitration with respect to controversies arising out of such business. Agreements to arbitrate by minors depend upon the ordinary principles relating to minors' contracts, concerning which there exists great diversity in the different countries. Partners may have in some countries the implied power to bind the partnership by a contract to submit to arbitration controversies arising out of the partnership business, whereas in others they are not able to do so without express authorization or ratification.

Revocability. The history of the Anglo-American doctrine of the revocability of agreements to submit disputes to arbitration has been indicated. The notion that arbitration agreements may be valid but revocable is foreign to continental and Latin-American countries; they are either valid or invalid, and if valid, are irrevocable. Under the modern arbitration statutes in the United States agreements for arbitration are irrevocable. In England they are irrevocable except by leave of court or a judge.⁴⁷

Stay of Proceedings. Wherever an agreement to arbitrate is regarded as valid and irrevocable, any court action brought in violation thereof will, on defendant's motion, be stayed or dismissed for want of jurisdiction.⁴⁸ In England the court is under

45. ARGENTINE, CODE CIV. PROC. art. 770; URUGUAY, CODE CIV. PROC. art. 540; ESQUIVEL OBREGÓN, *op. cit. supra* note 32, at 798.

46. See RUSSELL, *op. cit. supra* note 36, at 21-23; STURGES, *op. cit. supra* note 15, at 159 *et seq.*

47. ARBITRATION ACT (1889) § 1.

48. Austria (See Wehli, *Arbitral Tribunals under Austrian Law*, 1 NUSSBAUM 117); Denmark (See Raffenberg, *Recht und Praxis der Schiedsgerichte in Dänemark*, 2 NUSSBAUM 6); Germany, CODE CIV. PROC. § 274; Holland (See Van Praag, *Arbitral Tribunals for Civil and Com-*

a prima facie duty to grant such a stay, but it may, for sufficient reasons, decline to do so.⁴⁹ Under the modern arbitration acts of the United States the courts have no discretionary power, but must grant the stay whenever it appears that a valid submission agreement exists, and the dispute falls within such agreement.⁵⁰

Specific Performance. No method for the specific performance of arbitration agreements is provided by the English Arbitration Act of 1887.⁵¹ Under the modern arbitration statutes in the United States⁵² the defaulting party may be ordered by the court to proceed to arbitration; and when the terms of the statute have been satisfied, the specific performance of the contract is made mandatory, without any discretionary power on the part of the court.⁵³ On the continent the specific performance of contracts is regarded in some countries as the normal remedy for the breach of contract, and not as an extraordinary remedy to be granted only when damages are inadequate.⁵⁴ In such countries agreements for arbitration can, of course, be specifically enforced.⁵⁵ In other countries the remedy of specific performance does not exist or is granted only hesitatingly.⁵⁶

Who Can Be Arbitrators? Most countries have liberal provisions on this subject. Generally it is sufficient that the arbitrator shall have legal capacity, no discrimination being made against women⁵⁷ or foreigners.⁵⁸ In some countries there is a specific provision that no local judge in active service can be an

mercial Disputes under the Law of the Netherlands, 1 NUSSEBAUM 102); Hungary (Fabinyi, *supra* note 40, at 35); Italy (Ascarelli, *supra* note 40, at 82); Poland (CODE CIV. PROC. art. 486, § 2, 3 NUSSEBAUM 266); Sweden (See Fehr, *Schiedsgerichte nach schwedischem Recht*, 2 NUSSEBAUM 44-45).

49. *Supra* note 47, § 4.

50. For a criticism of the mandatory provisions relating to stay and specific performance, see Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* (1932) 46 HARV. L. REV. 1258.

51. See n. 120, *infra*.

52. Regarding statutory submission agreements, see STURGES, *op. cit. supra* note 15, at 83.

53. The Massachusetts act does not provide for specific performance. MASS. GEN. LAWS (1932) c. 251.

54. See GERMANY, CIV. CODE § 2401.

55. Denmark (Raffenberg, *supra* note 48, at 7); Norway (BLUE BOOK 55); Sweden (Fehr, *supra* note 48, at 45).

56. GODRON, *LA CLAUSE COMPROMISSOIRE* (1916).

57. In some countries women cannot be arbitrators. For example, Holland, Van Praag, *supra* note 48, at 101.

58. In Spain, arbitrators who are not amicable compounders must be citizens. Ballvé, *Das Schiedsgerichtswesen in Spanien*, 2 NUSSEBAUM 96.

arbitrator.⁵⁹ Spain and some Latin-American countries require "legal" arbitrators to be trained in the law.⁶⁰

Appointment of Arbitrators and Umpires. Statutes frequently provide that if a party who is to appoint an arbitrator does not do so in due time or if two arbitrators are to choose an umpire and cannot agree upon a choice, the court may make such appointment.⁶¹ In some countries such power does not exist⁶² or its existence is doubtful.⁶³

Judicial Determination of Validity of Submission Agreements Prior to Rendition of Awards. In England and the United States the courts have the power where an action has been brought impeaching the contract of arbitration to restrain the defendant from proceeding to arbitration until the right to impeach has been determined. The foreign codes are generally silent on the subject.⁶⁴ In Germany such an action is not allowed to interfere with or to delay the arbitral proceedings. Section 1037 of the Code of Civil Procedure reads: "The arbitrators may continue the proceedings and render an award, even if the permissibility of the arbitral proceedings is denied, especially when it is contended that a valid submission agreement does not exist, that the submission agreement is inapplicable to the dispute in question, or that an arbitrator is not competent to proceed with the arbitral proceedings."

Arbitration Hearing. The statutes of the different states in this country⁶⁵ and of foreign countries vary greatly in their attitude in this matter. Some prescribe detailed rules for the regulation of the arbitral proceeding; others leave it to the determination of the parties or to the arbitral tribunal, subject to certain reservations.⁶⁶ The English Arbitration Act of 1887

59. AUSTRIA, CODE CIV. PROC. § 578; Hungary, Fabinyi, *supra* note 40, at 43; POLAND, CIV. PROC. art. 489, § 2, 3 NUSSBAUM 266.

60. SPAIN, CODE CIV. PROC. art. 790.

61. So in England, ARBITRATION ACT (1889) § 5; and generally in the United States, STURGES, *op. cit. supra* note 15, at 7 *et seq.*; AUSTRIA, CODE CIV. PROC. § 582; GERMANY, CODE CIV. PROC. § 1029, par. 2; NORWAY, CODE CIV. PROC. § 455; POLAND, CODE CIV. PROC. art. 492, § 1; SWEDEN, ARBITRATION LAWS (1929) No. 145, § 8, 3 NUSSBAUM 269, 270.

62. E.g., Denmark, Raffenberg, *supra* note 48, at 7.

63. The French Law of 1925 contains no provisions on the subject. The Government bill did not provide for such an appointment, whereas the bills of Flandis & Clementel did so provide, on the condition, however, that the domestic laws of the other party to the arbitration admits of the same procedure. André-Prudhomme, *supra* note 29, at 75.

64. Such impeachment is allowed also in at least some of the foreign countries. Denmark, Raffenberg, *supra* note 48, at 6; Canton of Bern, CODE CIV. PROC. art. 385.

65. See STURGES, *op. cit. supra* note 15, at 422-519.

66. In some cantons of Switzerland the parties may determine the procedure, and if they do not do so, the ordinary procedure before the

contains various provisions relating to the conduct of the reference, but these control only when the parties have not expressed a contrary intention in their submission agreement.⁶⁷ On the continent there appears to be agreement that the arbitrators cannot subpoena witnesses or administer oaths. Where this necessity occurs recourse must be had to the courts.⁶⁸

Are the Arbitrators Bound by Law? May the parties validly stipulate that "The arbitrators and umpire shall interpret this present agreement as an honorable engagement, rather than as a merely legal obligation . . . The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of law"?⁶⁹ In some countries the codes regulate two types of arbitration known as "legal" arbitration and arbitration by "amicable compounders,"⁷⁰ the latter not being bound by rules of law.⁷¹ In these countries it is clear that "arbitrators" in the strict sense must apply legal rules. In other countries only one system appears in the code but there is an express provision that arbitrators must comply with rules of law unless the parties have agreed that they shall act merely as "amicable compounders."⁷² In still other coun-

President of the Tribunal sitting as a single judge controls. In others the procedure may be determined by the arbitral court, subject to certain mandatory provisions. In still others the proceedings are controlled by the rules governing in the ordinary courts. See Fritsche, *supra* note 33, at 59.

67. ARBITRATION ACT (1887) First Schedule. RUSSELL, *op. cit. supra* note 36, at 338 *et seq.*

68. As to the different attitude taken in England and the United States, see ARBITRATION ACT (1887) § 8, The First Schedule (g); RUSSELL, *op. cit. supra* note 36, at 160-161; STURGES, *op. cit. supra* note 15, at 390 *et seq.*, 486 *et seq.*

69. See *Pacific Indemnity Co. v. Insurance Co.*, 25 F. (2d) 930, 931 (C. C. A. 9th, 1928).

70. For example, Spain, Argentina, Brazil, Chile, Cuba, Mexico, Venezuela. See ESQUIVEL OBREGÓN, *op. cit. supra* note 32, at 798. In some Latin-American countries the amicable compounders are called "arbitros arbitratores" or simply "arbitratores." See CHILE, CODE CIV. PROC. arts. 792 *et seq.*; MEXICO, CODE CIV. PROC. arts. 1334 *et seq.*; VENEZUELA, CODE CIV. PROC. art. 510.

In Spain, Argentina and Cuba the codes expressly provide that the decisions by amicable compounders shall be rendered exclusively on the basis of documents submitted and the testimony of the parties. SPAIN, CODE CIV. PROC. art. 833, par. 2; ARGENTINA, CODE CIV. PROC. art. 802; CUBA, CODE CIV. PROC. art. 832.

71. So expressly, ARGENTINA, CODE CIV. PROC. art. 802; CUBA, CODE CIV. PROC. art. 832; MEXICO, CODE CIV. PROC. arts. 1281, 1340; see also ESQUIVEL OBREGÓN, *op. cit. supra* note 32 at 798. *cf.* LA. CIV. CODE (1932) §§ 3109-3110.

72. FRANCE, CODE CIV. PROC. art. 1019; BELGIUM, CODE CIV. PROC. art. 1019; HOLLAND, CODE CIV. PROC. art. 636; ITALY, CODE CIV. PROC. art. 20.

tries, though amicable compounders are unknown as such,⁷³ arbitrators are not necessarily governed by strict rules of law.⁷⁴

In England the arbitrators must apply the ordinary rules for the administration of justice in the absence of an express provision in the submission to the contrary, and failure to do so may amount to such misconduct that the award will be set aside.⁷⁵ In the United States, it seems, arbitrators are not bound by the strict rules of law or equity unless there is an express stipulation to this effect in the agreement for arbitration.⁷⁶ However, if the arbitrators undertake to decide the dispute according to strict law and it appears from the face of the award that they have misconceived any principles of law applicable to the case, the award will be set aside.⁷⁷

The Rules of Conciliation and Arbitration of the International Chamber of Commerce provide that "The Court of Arbitration shall give to the arbitrators or arbitrator power to act as 'amisables compositeurs' whenever all parties to the arbitration have previously given their consent to this course and it will not in any way interfere with the legal enforcement of the award."⁷⁸

III

THE CONFLICT OF LAWS

United States. Questions involving arbitration agreements from the standpoint of the conflict of laws rarely came before the state courts prior to the adoption of the modern arbitration statutes. The leading case on the subject is *Meacham v. James-town, Franklin & Clearfield Ry. Co.*, decided by the New York Court of Appeals in 1914.⁷⁹ A contract had been entered into in Ohio between two Pennsylvania corporations for the construction of a railway in Pennsylvania. The contract contained a

73. E.g., in Germany and Austria.

74. According to Nussbaum, the recent development in Germany tends toward the recognition of the binding force of the law. Nussbaum, *Problems of International Arbitration*, 1 NUSSBAUM 20. Section 1042, par. 2 of the German Code of Civil Procedure, as amended in 1924, determines that the arbitrators cannot disregard provisions that are *jus cogens*. This provision was abrogated, however, by the Law of July 25, 1930 (RGL 1930 II p. 361).

75. RUSSELL, *op. cit. supra* note 36, at 379-380.

76. STURGES, *op. cit. supra* note 15, at 500-502.

77. *King v. The Falls of Neuse Manufacturing Co.*, 79 N. C. 360 (1878). "The cases have not yet fully determined to what extent arbitration may disregard statutory law as distinguished from the law of the courts." STURGES, *op. cit. supra* note 15, at 501.

78. Arbitration Rules, Art. 16 (3), 1 NUSSBAUM 263.

79. 211 N. Y. 346, 105 N. E. 653 (1914).

provision that all matters in dispute arising out of the contract were to be decided by the chief engineer of the railroad company, the parties waiving "all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator." Under the law of Pennsylvania the arbitration clause could be specifically enforced. Suit was brought in New York to recover a certain sum alleged to be due under the contract. The trial court dismissed the complaint on the ground that a submission to the chief engineer and an award by him, or an offer or tender of such submission on the part of the plaintiff was a valid condition to plaintiff's right to sue. The judgment was affirmed by the Appellate Division but was reversed by the Court of Appeals. Judge Hogan, in writing the opinion of the court, advanced the following argument in support of the decision:

"Tested by the principles of the cases cited, we conclude that the language employed in the contract in question is susceptible of but one construction, namely, an attempt on the part of the parties to the same to enter into an independent covenant or agreement to provide for an adjustment of *all* questions of difference arising between the parties by arbitration to the exclusion of jurisdiction by the courts.

"Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts . . . shall be enforced as between non-residents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state." ⁸⁰

Judge Cardozo, in a concurring opinion, justified the decision of the court on the ground that the agreement to submit all differences to arbitration related to the law of remedies. The reasoning of the learned Judge was as follows:

"An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. In applying this rule, regard must be had not so much to the form of the agreement as to its substance. If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned . . . it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action. A rule would not long survive if it were subject to be avoided by so facile a device.

80. *Id.* at 351-352, 105 N. E. at 655.

Such a contract, whatever form it may assume, affects in its operation the remedy alone." ⁸¹

To what extent have the recent arbitration statutes brought about a change of attitude on the part of our courts? From the standpoint of the conflict of laws there is probably no field in which a greater variety of fact situations may conceivably arise. The following situations involving a foreign element may present themselves, whether or not the state be one having a modern arbitration act: The contract may be made in the state and call for arbitration in another state or in a foreign country, or it may be silent on the question where the arbitration is to take place. Or the contract may have been made in some other state or country without specifying where the arbitration is to take place; or it may call for arbitration in the state of the forum, or it may call for arbitration in a third state. Finally, it may not appear where the contract was made, but the place of arbitration may be specified to be the state of the forum, or some third state or country.

In each of the above situations, the law of the state in which the contract was made may render it irrevocable or revocable and unenforceable. If it is valid and enforceable by the *lex loci*, it may be unenforceable by the law of the state or country in which the arbitration is to take place; or, what is more likely to happen in fact, it is made in a state or country under the local law of which it is unenforceable, and arbitration is to take place in a state or country in which it is valid and enforceable. Further complications will occur if the residence or domicile of the parties is a material factor, for in each of the above situations both parties may be residents of the same state or country—of the state or country where the agreement for arbitration was made or where the arbitral tribunal is to sit, or of the forum, or of some other state or country—or they may be residents of different states or countries.

Which of the above cases would fall within an arbitration statute of the forum? If it falls within such a statute of the forum for one purpose, does it necessarily fall within it for all purposes? Will a stay of proceedings be granted by virtue of the arbitration statute of the forum? Will the parties be ordered to proceed to arbitration in another state or country? Under what circumstances will an arbitrator be appointed in accordance with the local statute? The actual decisions of the courts in this country throw little light upon the problems suggested; so far as they point in any definite direction it would

81. *Id.* at 352, 105 N. E. at 655.

appear that they are unfavorable from the standpoint of interstate and international commercial arbitration.

In *Matter of Berkovitz v. Arbib & Houlberg*,⁸² various questions arose with respect to the application of the New York Arbitration Act of 1920. Was it applicable to contracts made prior to its enactment? Was it applicable to an action brought prior to the enactment of the law? Was it applicable to a provision for arbitration made and to be performed in a jurisdiction where arbitration was enforceable when the contract was made and to be performed? Was it applicable to a contract containing a provision for arbitration without the state of New York? In answering the first question in the affirmative and the second in the negative, the learned court, speaking through Judge Cardozo, said:

"The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies . . . The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."⁸³

The questions actually decided by the case were not questions of the conflict of laws in the ordinary sense but the application of the statute from the standpoint of time, that is, whether it was to be applied to existing contracts and pending actions. For the purpose in hand it was held that the statute was remedial and was therefore applicable to existing contracts. The court did not find it necessary to answer the other questions submitted but left them open for future consideration.⁸⁴

One of these later came before the First Department of the Appellate Division of New York in *Matter of Inter-Ocean Food Products, Inc.*,⁸⁵ in which a contract for the purchase of Cali-

82. 230 N. Y. 261, 130 N. E. 288 (1921).

83. *Id.* at 270, 130 N. E. at 289, 290.

84. Under the California Arbitration Act, arbitrations shall be held in California unless the parties have agreed in writing after the controversy arises that it shall be held elsewhere. CAL. CODE CIV. PROC. (1930) § 1286.

85. 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dep't 1923). The case was approved by the Court of Appeals in *Matter of Marchant v. Mead-Morrison Manufacturing Co.*, 252 N. Y. 284, 169 N. E. 386 (1929). See also *In re California Packing Corp.*, 121 Misc. 212, 201 N. Y. Supp. 158 (Sup. Ct. 1923). In this case the contract provided for arbitration in California. The court denied an application for an order directing that the arbitration proceed in California, but held that the arbitration might be compelled in New York.

fornia raisins had been made in New York between two New York corporations. Under the terms of the contract all disputes arising out of the contract were to be settled before the arbitration committee of the Dried Fruit Association in San Francisco. In a dispute arising out of the contract, upon a motion of the seller before the Supreme Court of New York, an order was made that the parties proceed to arbitrate in California all disputes between them as provided for in the contract. This order, however, was reversed by the Appellate Division, which held that the only remedy available in the courts of New York was a stay of proceedings. The reasoning of the court was as follows:

"The general trend of authority, it seems to me, is that no court will willingly relinquish jurisdiction over controversies arising between those who are amenable to its judgments, nor will any sovereignty order its citizens or subjects to go before the tribunals of another sovereignty and submit to its jurisdiction that their differences may be adjudicated.

"I am of the opinion that while an agreement to arbitrate in a foreign jurisdiction, and before a foreign arbitrator, is not invalid or illegal, it cannot be enforced as between citizens of this State who are the parties thereto, by compelling them to go without the State, in a foreign jurisdiction and before a foreign tribunal, there to arbitrate their disputes." ⁸⁶

Inasmuch as California at the time of this decision had not yet adopted its modern arbitration act, arbitration could not have been compelled in that state. No reference, however, was made to this fact in the opinion of the court.

The above case was followed as precedent by the Supreme Court of New York in *Kelvin Engineering Co. v. Blanco*,⁸⁷ where a contract, made in Cuba, provided that the parties "submit themselves to the courts of the City of Santiago de Cuba for all questions relating to the performance or non-performance of this contract, expressly renouncing their right to litigate in any other place." It does not appear from the case whether both parties were residents of Cuba or not.⁸⁸

86. *Supra* note 85, at 432-433, 201 N. Y. Supp. at 540.

87. 125 Misc. 728, 210 N. Y. Supp. 10 (Sup. Ct. 1925).

88. "It would be too strict and narrow a limitation of the intention of the parties as expressed," said the court to hold that an agreement to submit to courts of foreign jurisdiction should not be treated as a submission to arbitration within the purview of the Arbitration Law." *Id.* at 733, 210 N. Y. Supp. at 15.

Whereas stipulations like the above may be deemed to fall within the local arbitration act and thus to justify a stay, they do not oust the jurisdiction of the courts. See *Sudbury v. Ambi Verwaltung Kommanditgesellschaft auf Aktien*, 213 App. Div. 98, 210 N. Y. Supp. 164 (1st Dep't

The question of the power to order arbitration in another state has recently come before the Supreme Court of Pennsylvania in the case of *Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp.*⁸⁹ Plaintiff, a Japanese corporation having an office in New York, agreed to sell to the defendant, a Pennsylvania corporation, bales of raw silk. The contracts provided that "Every dispute, of whatever character, arising out of this contract, *must* be settled by arbitration in New York, to be conducted in the manner provided by the by-laws, rules and regulations of the Silk Association of America, Inc., governing arbitration." A dispute having arisen under the contract, the plaintiff prayed an order on the defendant to show cause why the dispute "should not be submitted to arbitration in the manner provided for in said contract." The Supreme Court, reversing the decision of the lower court, held that the plaintiff's petition should be allowed.

"The principal contention made in the opinion of the court below is that our Arbitration Act relates only to arbitrations to be held in Pennsylvania. The statute does not say so, and the argument brought forward to show that under sections 6, 10, and 11 (5 PS §§ 166, 170, 171) that conclusion must be implied, is not only both labored and inconclusive, but also wholly overlooks other sections of the act. Moreover, it ignores the legal principle that it is our duty to sustain the act, if this can reasonably be done, and not to destroy it either in whole or in part."⁹⁰

1925) (contract made in Germany between a resident of New York and a German corporation vesting exclusive jurisdiction in the German courts); *Sliosberg v. New York Life Insurance Co.*, 217 App. Div. 685, 217 N. Y. Supp. 226 (1st Dep't 1926) (contract made in Russia between a resident of Russia and a New York corporation submitting dispute to the jurisdiction of the St. Petersburg courts only). See also, *The Fredensboro*, 18 F. (2d) 983 (E. D. Pa. 1927); *Danielsen v. Entre Rios Rys. Co.*, 22 F. (2d) 326 (D. Md. 1927).

89. 170 Atl. 286 (Pa. 1934). In *Katakura & Co. v. Vogue Silk Hosiery Co.*, 307 Pa. 544, 161 Atl. 529, 1932), the lower court had ruled that it had power to order the defendant to go to New York to submit to arbitration, but the Supreme Court had found it unnecessary to discuss the question, holding that a provision in the contract of arbitration that "Hearings shall be held customarily at Association Headquarters [New York City] where adequate room will be provided" did not designate New York as the exclusive place where the arbitration might be held under the contract, and that such arbitration might be enforced in Pennsylvania in the manner provided by the rules of the Association, or so far as they were not inconsistent with the laws of Pennsylvania and with the rules of the court of common pleas concerning procedure and practice under the Pennsylvania Arbitration Act.

90. *Id.* at 289. In accord see *California Lima Bean Growers' Association v. Mankowitz*, 154 Atl. 532 (N. J. 1931). Other courts, however, have in this situation ordered arbitration in accordance with the local law, dis-

By what law will the validity and enforceability of arbitration agreements be determined, if they are made in some state or country other than that of the forum? Will the courts go so far in their procedural point of view as to hold that the law of the forum governs without regard to the law of the state where the contract is made or the arbitration is to take place? The modern legislation making arbitration agreements enforceable has been held to be remedial for some purposes; will it be held to be remedial for all purposes? Suppose a contract was unenforceable both by the law of the state where it was made and the law of the state where the arbitration is to be held, would it be enforceable nevertheless in any state having a modern arbitration statute? No direct decision on the point has been found. In *Estate Property Corp. v. Hudson Coal Co.*,⁹¹ a contract involving the lease of a Pennsylvania coal mine provided for the arbitration of all disputes or differences. An action arising out of an alleged breach of this contract having been brought in New York, the learned court observed: "But should the Court entertain jurisdiction in view of the arbitration clause contained in the agreement? The solution of this, in the light of the subject-matter and the contemplation of the parties, must be governed by the law of Pennsylvania."⁹² The court interpreted the Pennsylvania act, which contained provisions identical to those in New York, as applicable to contracts made prior to its enactment, provided no action was pending on the contract at the time of the passage of the act. In so doing, the court either ignored or overlooked the express provision in the Pennsylvania statute that it "shall not apply to contracts made to the taking effect of this act."⁹³ Hence it is not clear whether the New York court would have applied the Pennsylvania statute had it known of its variance from the New York statute. The facts of the case do not disclose where the contract was made, nor the states in which the plaintiff and defendant corporations had been organized. The language of the court would indicate that it was inclined to look to the law of Pennsylvania as governing the enforceability of the contract, on the ground that the coal operations to which the contract related were to take place in Pennsylvania and that the parties must therefore be deemed to have contracted with reference to such

regarding the stipulation altogether. In *re* California Packing Corp., *supra* note 85; see also *In re* Nozak Brothers, Inc., N. Y. L. J. Aug. 5, 1931.

91. 132 Misc. 590, 230 N. Y. Supp. 372 (Sup. Ct. 1928).

92. *Id.* at 595, 230 N. Y. Supp. at 378.

93. PA. STAT. SUPP. (1928) § 606a-19.

law.⁹⁴ So far the courts have paid little attention to the place where the arbitration agreement was made or where it was to be performed, or to the domicile of the parties.

Another problem relates to the appointment of arbitrators by the courts where the party under a duty to make such appointment fails to do so, or the arbitrators cannot agree upon an umpire. The question which court is the proper one to lend such assistance came before the New York Court of Appeals in *Matter of Marchant v. Mead-Morrison Manufacturing Co.*⁹⁵ The contract for arbitration, in this case between a New York and a Maine corporation, was concluded in Massachusetts and called for the manufacture and delivery of tractors in that state. The arbitration clause did not specify where the arbitration was to take place. A controversy having arisen, the two arbitrators selected by the parties were unable to agree upon a third. On motion of the buyer's trustee in bankruptcy a third arbitrator was appointed by the Supreme Court of New York and the parties were directed to proceed to arbitration before the tribunal thus constituted. Both parties entered appeals from the award rendered, of which defendant's was a challenge to the order directing arbitration. The Court of Appeals held the challenge to be too late, on the ground that, since the Supreme Court had power to appoint the third arbitrator, the order was not void, and there had been at most an error in the use of it.

"A State is without power to modify by its statutes the terms, express or implied, of contracts made in other states in contemplation of their laws. The case may be supposed of an agreement made in Boston that a controversy shall be arbitrated by the Chamber of Commerce of that city, with the express provision that in no event shall there be arbitration by any one else. If the law of Massachusetts refuses to permit the appointment of a substitute, the law of New York may not modify by statute the content of the promise, and designate a substitute in the teeth of the agreement."⁹⁶

The case decides nothing more than that the power of the trial court to appoint an arbitrator could not, under the circumstances, be raised collaterally.

The cases so far discussed arose in a state having a modern arbitration act. What, in view of the modern trend in legisla-

94. "If defendant should with reasonable dispatch move for a stay of this action pending a proper application to enforce arbitration, the motion would most likely be granted." *Estate Property Corp. v. Hudson Coal Co.*, *supra* note 91, at 597, 230 N. Y. Supp. at 380.

95. *Supra* note 85.

96. *Id.* at 294-295, 169 N. E. at 389.

tion relating to commercial arbitration, will be the attitude of courts in states where such agreements are still revocable appears from the decision in *Vitaphone Corp. v. Electrical Research Products*.⁹⁷ An agreement had been made in New York between a New York corporation and a Delaware corporation, providing that all disputes arising out of a certain contract were to be submitted to arbitration in New York. Two efforts were made to settle some of the disputes by arbitration. The third effort became nugatory by reason of the resignation of an arbitrator. After a successor had been appointed, the arbitration continued, and many hearings held at great expense, complainant requested the arbitrators to withdraw from the proceedings. On their refusal to do so, a bill was filed in Delaware praying for relief. The respondent pleaded the arbitration agreement as a substantive defense. The Chief Justice, sitting as Chancellor, overruled the plea on the ground that the contract and the New York Arbitration Law merely provided a remedy for the settling of disputes. With matters of remedy governed exclusively by the law of the forum, and the courts of Delaware still opposed to being ousted of jurisdiction by the agreement of parties to an arbitration, the learned Chief Justice concluded that no effect could be given to a different policy established in New York by statute. The Supreme Court of Delaware⁹⁸ overruled the decision of the lower court for the reason that in its opinion the arbitration proceedings had not broken down, so far as a Court of Equity was concerned, and the complainant was therefore not justified in repudiating the obligations providing for such proceedings. But aside from this fact and complainant's consequent lack of "clean hands," the higher court's views regarding the law seem to agree with those of the court below, as appears from the following:

"The respondent, therefore, contends that the arbitration clauses of these contracts irrevocably bind the parties to them, not only in the State of New York, but elsewhere, and that its plea should have been sustained by the court below.

"This conclusion is based on the theory that the New York statute, and the contracts based thereon, relate to material and substantive rights, and that such rights are not only protected under the full faith and credit clause (Art. 4, Sect. 1) and the due process clause (14th Amendment) of the federal constitution, but, also, by the rule of comity between states.

97. 166 Atl. 255 (Del. Ch. 1933). See also 167 Atl. 845 (Del. Ch. 1933). See in regard to this case, Phillips, *Arbitration and Conflict of Laws: A Study of Benevolent Compulsion* (1934) 19 CORN. L. Q. 197, at 216, n. 78; also (1933) 47 HARV. L. REV. 125; (1933) 33 COL. L. REV. 1440.

98. Not yet reported.

"A contract, providing for arbitration, merely provides a remedy for the settling of disputes . . . The same rule applies, though by the terms of a statute arbitration contracts are made both irrevocable and enforceable . . . In considering the effect of the statute, Judge Cardozo, after reiterating his previous statement, that arbitration was merely a form of procedure for the settlement of differences, also added: 'It is not a definition of the rights and wrongs, out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.' That being true, *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, has no application to this case. The contract therein referred to was of statutory origin, but it clearly affected substantive rights, and not mere matters of procedure. Substantive contractual rights were also involved in *Home Ins. Co. v. Dick*, 201 U. S. 397."

The question arises as to whether the attitude of the federal courts with reference to arbitration agreements has been more favorable than that of the state courts. In this connection, it must be borne in mind that the United States Arbitration Act, modeled after that of the New York Act, was not adopted until 1925;⁹⁹ it must likewise be recalled that before this Act the remedy of specific performance was not available in our courts of admiralty. The question confronting the federal courts before 1925 was, therefore, whether they would recognize agreements for arbitration entered into in the state in which the court was sitting, or in some other state or country, and valid and enforceable by the law of such state or country, or valid and enforceable by the law of the state or country where the arbitration was to be held. The present article is concerned only with the attitude of the federal courts with respect to arbitration agreements entered into in a state or country other than the one in which the federal court is sitting.¹⁰⁰ With respect to

99. See p. 458, *supra*.

100. The federal courts have declined to enforce the local state arbitration statute although the contract was made and the arbitration was to take place in the state in which the court was sitting. *Atlantic Fruit Co. v. Red Cross Line*, 276 Fed. 319 (S. D. N. Y. 1921), *aff'd*, 5 F. (2d) 218 (C. C. A. 2d, 1924); *Lappe v. Wilcox*, 14 F. (2d) 861 (N. D. N. Y. 1926).

While the case of *Atlantic Fruit Co. v. Red Cross Line*, *supra*, was standing for trial in the lower federal court, proceedings were instituted in the state courts of New York for the specific performance of the contract. The case went up to the Court of Appeals, which held that the New York Arbitration Act could not apply to maritime contracts. The Supreme Court of the United States reversed the decision on the ground that the New York Act related to procedure and thus did not conflict with the uniformity doctrine established by the *Jensen* case. *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924). State courts may accordingly apply their arbitration statutes to maritime contracts with respect to

such foreign contracts the federal courts had held unanimously, prior to the United States Arbitration Act of 1925, that arbitration agreements made elsewhere, and valid both by the *lex loci* and the law of the state where the arbitration was to be held, were not enforceable.¹⁰¹

To what extent has the United States Arbitration Act of 1925¹⁰² changed the law so far as the federal courts are concerned? The Act is entitled "An act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the states or territories or with foreign nations."¹⁰³ Section 2 of the Act makes agreements complying with its terms "valid, irrevocable, and enforceable." Section 3 provides that where an action is brought in any court of the United States in violation of the agreement for arbitration, the

which they have concurrent jurisdiction with the federal courts. Notwithstanding the decision by the Supreme Court, the Circuit Court of Appeals felt obliged to affirm the decision of the District Court on the ground that the New York Arbitration Act, being procedural in its nature, cannot affect the procedure and practice of the admiralty courts.

In the following year, 1925, Congress passed the United States Arbitration Act which provides for the specific performance of arbitral clauses in maritime and other contracts. See Poor, *Arbitration Under the Federal Statute* (1927) 36 YALE L. J. 67 (1927); Baum and Pressman, *Enforcement of Commercial Arbitration Agreements in the Federal Courts* (1930-1931) 8 N. Y. U. L. Q. 238, 428.

Regarding removal to a federal court of proceedings for arbitration under a state statute in a state court, see STURGES, *op. cit. supra* note 15, at 940-945; Baum and Pressman, *supra*, at 253-256; Note (1929) 42 HARV. L. REV. 801.

101. United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (S. D. N. Y. 1915). Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 232 Fed. 403 (S. D. N. Y. 1916), *aff'd*, 250 Fed. 935, and 252 U. S. 313 (1920); The Eros, 241 Fed. 186 (E. D. N. Y. 1916), *aff'd*, 251 Fed. 45 (C. C. A. 2d, 1918); see also Tatsuuma Kisen Kabushiki Kaisha v. Prescott, 4 F. (2d) 670 (C. C. A. 9th, 1925). The question whether the decisions of the highest court of the state in which the federal court is sitting or the decisions of the Supreme Court of the United States were controlling in this matter, was held to be one of general law and thus governed by the decisions of the United States Supreme Court holding arbitration agreements to be against public policy. Insurance Co. v. Morse, 20 Wall. 445 (U. S. 1874); Doyle v. Continental Insurance Co., 94 U. S. 535 (1876). The same conclusion would be reached if suit were brought before a federal court in a state having a modern arbitration act. See Atlantic Fruit Co. v. Red Cross Line, 5 F. (2d) 218 (C. C. A. 2d, 1924); California Prune and Apricot Growers' Association v. Catz American Co., 60 F. (2d) 788 (C. C. A. 9th, 1932).

102. 43 STAT. 883 (1925), 9 U. S. C. §§ 1-15 (1926).

103. A shipment between two foreign countries has been held not to constitute commerce among the several states or with foreign nations within the meaning of the United States Arbitration Act. The Volsinio, 32 F. (2d) 357 (E. D. N. Y. 1929).

court shall "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, provided the applicant for the stay is not in default in proceeding with such arbitration." Section 4 of the Act provides that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed . . ." ¹⁰⁴

If an agreement for arbitration is of the type specified in the Act, does the fact that it calls for arbitration in a country other than the United States prevent the enforcement of the agreement by the federal courts? If the case is not within the federal statute, has the act so changed the policy of the federal courts that an agreement for arbitration, valid by the proper law, will be recognized and enforced? May a petition be filed in the federal courts of this country in such a case for an order to compel arbitration, and if suit is brought in violation of the agreement will a stay be granted? In *The Silverbrook*,¹⁰⁵ where the question was raised for the first time, suit was brought in admiralty on foreign bills of lading providing for arbitration in London. The claimant moved for a stay of suit¹⁰⁶ and reference of the issue to arbitration. The motion was denied and the cause ordered to proceed in the usual course on the merits. The court said:

"Although the basis of jurisdiction in this case is a cause of action otherwise justiciable in admiralty, and begun by a libel and seizure of a vessel according to the usual course of admiralty proceedings, and therefore of the class contemplated by section 8 of the United States Arbitration Act, this court is without jurisdiction to direct the parties to proceed to arbitration as required by the concluding clause of that section, because the place and manner of arbitration prescribed by the terms of the contract are beyond the jurisdiction of

104. Section 8 of the Act provides as follows: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

105. 18 F. (2d) 144 (E. D. La. 1927).

106. A motion for a stay of suit is the proper method of raising the question; an exception to the jurisdiction will not do. *The Fredensboro*; see also *Danielsen v. Entre Rios Rys. Co.*, both *supra* note 88.

this court, since the hearings and proceedings thereunder cannot be held conformable to the terms of this statute, and particularly to section 4, which requires the arbitration to proceed within the district in which the petition for an order directing such arbitration was filed.”¹⁰⁷

The language of Section 4 of the Act is, of course, not free from doubt from the standpoint of statutory construction, but the question is whether it should be so limited as to nullify the provisions of the same section that the order directing the parties to proceed with the arbitration shall be “in accordance with the terms of the agreement.”¹⁰⁸ The District Court for the Southern District of New York reached the same conclusion as did the court in *The Silverbrook*.¹⁰⁹ On the other hand, Judge Coleman in *Danielson v. Entre Rios Rys. Co.*¹¹⁰ has expressed the view¹¹¹ that even if the remedy of specific performance under Section 4 were limited to agreements performable in the United States, the broad language of Section 3 would warrant the granting of a stay in cases where the arbitration is to take place in a foreign country.

“The effect of the act then seems to be that it requires the courts to stay trial, upon motion of one of the parties, until arbitration is had, and to order arbitration if, as provided in section 4, ‘the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.’ In other words, there is nothing in the Act which indicates that, although the arbitration provided for may be beyond the jurisdiction of the court, this shall forestall or in any way curtail jurisdiction which the court would normally have of maritime suits. On the contrary, as is seen from the language of the sections of the act above quoted, it is contemplated that the proceedings may be brought in the usual manner and jurisdiction over the arbitration assumed if the arbitration provided for is to take place within the court’s jurisdiction; if not, then the proceedings shall be stayed until the foreign arbitration is perfected, whereupon the court has power to enter a decree upon the award. That is to say, the only limitation imposed upon the court is a stay pending the perfection of what cannot be accomplished within the jurisdiction of the court, and such a stay is

107. *Supra* note 105, at 147.

108. STURGES, *op. cit. supra* note 15, at 929-930.

109. *The Beechwood*, 35 F. (2d) 41 (S. D. N. Y. 1929).

110. *Supra* note 88. Judge Campbell in *The Volsinio*, *supra* note 103, stated that he agreed with Judge Coleman and disagreed with *The Silverbrook*, *supra* note 105.

111. The question of whether the foreign arbitration was a condition to assumption of jurisdiction, was denied by the court.

to be clearly distinguished from prohibition against assumption of jurisdiction in the first instance.”¹¹²

A stay has been denied also where a bill of lading provided that all controversies should be referred to the Court of Trieste with exclusive jurisdiction.¹¹³

In view of the strict construction given by the federal courts to the United States Arbitration Act, it is obvious that their attitude with reference to agreements for arbitration not falling within the Act remains as it was before the passage of the federal Act.¹¹⁴

England. Dicey states that “at one time effect would not be given to arbitration clauses in contracts, wherever made, as ousting the jurisdiction of the courts in England.”¹¹⁵ Although no early English cases involving the conflict of laws have been found, the English courts no doubt would have declined to enforce foreign contracts for arbitration as being opposed to the public policy of England. The attitude of the English courts was changed, however, as a result of the early adoption of the English arbitration acts recognizing arbitration agreements as valid and irrevocable. In the leading case of *Hamlyn & Co. v. Talisker Distillery*,¹¹⁶ an agreement was entered into in England between a Scottish concern and a London company for the sale and purchase of grain to be delivered in Scotland. The

112. *Supra* note 88, at 327-328.

113. *American Tobacco Co. v. Lloyd Triestino Società di Navigazione*, 1 A. M. C. 1135 (1928).

114. A federal court sitting in California has therefore no jurisdiction to compel the parties to proceed to arbitration in accordance with the California Arbitration Act, where the parties agreed that the disputes should be settled by arbitration in California. In reaching the above conclusion in *California Prune and Apricot Growers' Association v. Catz American Co.*, *supra* note 101, Judge Sawtelle made the following points: (1) the difficulty, if not impossibility, of harmonizing the California Arbitration Act with the federal law and procedure; (2) the federal courts are without power to enforce purely remedial or procedural state laws; (3) the Conformity Act (28 U. S. C. § 724) does not govern if the case is in the nature of an equity suit and thus excepted from the Conformity Act; (4) the case does not fall within the Rules of Decision Act (28 U. S. C. § 725), which refers only to substantive law.

In the earlier case of *Pacific Indemnity Co. v. Insurance Co.*, 25 F. (2d) 930 (C. C. A. 9th, 1928), the court had granted a stay, but the question of the jurisdiction of the federal court to enforce the local state statute had not been raised nor considered.

See also the discussion of the subject by Baum and Pressman, *supra* note 100, at 447 *et seq.*

115. DICEY, *CONFLICT OF LAWS* (5th ed., Keith 1932) 632 n.

116. [1894] A. C. 202.

contract contained the following clause: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." It was contended that the law of Scotland, where the contract of sale was to be performed, should govern, and that the clause was invalid in Scotland for failure to name the arbitrators. But the House of Lords reversed the decision of the Scottish court which had held the law of Scotland applicable, Lord Hershell declaring:

"In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance . . . In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract . . . Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England . . .¹¹⁷

"But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the courts of Scotland . . . But the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts of Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail."¹¹⁸

The case of *Spurrier v. La Cloche*,¹¹⁹ decided by the Privy Council, likewise rejected the *lex fori* in favor of the intention of the parties, and stayed an action upon an insurance policy in Jersey on the basis of a stipulation for arbitration made there but providing for arbitration in accordance with the English Arbitration Act.

From the standpoint of the conflict of laws, therefore, the

117. *Id.* at 207-208.

118. *Id.* at 210.

119. [1902] A. C. 446.

validity of a foreign contract for arbitration is determined with reference to the law governing contracts. If a valid arbitral contract has been entered into in conformity with such rule, and suit is brought in England with reference to the matter to be submitted to arbitration, the English courts "may" ¹²⁰ grant a stay of proceedings. The granting of the stay is within the discretion of the court.¹²¹ A stay has been allowed also where an English contract called for arbitration abroad and suit was brought in England with reference to the matter in dispute.¹²² Where a stay has been prayed by a non-resident foreigner, the order granting it has been made on the condition that he give security for the costs of the arbitration.¹²³ An agreement to submit disputes to a foreign court is held to be an arbitration agreement within the English Arbitration Act, entitling a party, in the absence of good reasons to the contrary, to an order staying an action brought in England contrary to the agreement.¹²⁴ In *Kirchner v. Gruban*,¹²⁵ the court, holding that such an order should be granted at defendant's request, required the defendant to give an undertaking or bond that he would submit to the jurisdiction of the foreign tribunal. The above cases were decided before the enactment of the Arbitration Clauses (Protocol) Act, 1924, which, in those cases where it is applicable, apparently deprives the court of all discretion in the matter of granting a stay.¹²⁶

The English law contents itself with granting a stay, but, it seems, never orders the parties to proceed to arbitration. Lord Justice Fletcher-Moulton, in summarizing the present English law, states:

"The parties could not be compelled to go to arbitration. They cannot now; but an appeal to the courts can be stopped, and that indirectly enforces the arbitration clause. Therefore the status of an arbitration clause in England is that it will not be specifically enforced, but by proper proceedings you can prevent the other party

120. ARBITRATION ACT (1889) § 1.

121. RUSSELL, *op. cit. supra* note 36, at 104 *et seq.* No discretion seems to exist under the corresponding provisions of the Scotch Act. *Crawford Brothers v. Commissioners of Northern Lighthouses*, [1925] S. C. (H. L.) 22.

122. *The Dawlish*, [1910] P. D. 339.

123. *In re Bjornstad and the Ouse Shipping Co.*, [1924] 2 K. B. 673.

124. *Law v. Garrett*, 8 Ch. Div. 26 (1878); *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society*, [1903] 1 K. B. 249; *The Cap Blanco*, [1913] P. D. 130.

125. [1909] 1 Ch. 413.

126. Under the Act of 1924, the court "shall" make an order staying the proceedings. See RUSSELL, *op. cit. supra* note 36, at 519.

from appealing to the English courts in respect of any matter which by contract ought to be decided by arbitration." ¹²⁷

To what extent the local provisions for appointment of arbitrators and supervision of the arbitral proceedings are applicable to agreements made outside of England, and specifying either no place for performance or a foreign place, does not appear from the English cases. It is doubtless safe to assume that if there is an express stipulation for arbitration under the English law, the English Act will apply in toto although the agreement may have been made in another country.

France. As indicated above,¹²⁸ before the French legislation of December 31, 1925, the local French law refused to recognize the validity of an arbitration agreement which did not indicate the objects in dispute and the names of the arbitrators, as required by Article 1006 of the Code of Civil Procedure. This article refers to agreements to submit existing disputes to arbitration (the so-called *compromis*), but it became the settled French law that this article applied likewise to clauses in contracts providing for the arbitration of future disputes (clause *compromissoire*). By virtue of Article 332 of the Commercial Code an exception existed in matters of marine insurance where arbitration of future disputes is recognized. The early decisions made no distinction between transactions local in character and those involving international elements. Such arbitral clauses were therefore regarded as void, irrespective of their place of making or performance, or of the nationality of the parties. Article 1006 was regarded as laying down a rule of international public order, which precluded the recognition under any circumstances of the validity of agreements for the arbitration of future disputes. Hence suit might be brought

127. *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.*, 105 L. T. 846, 852 (1911). But although the English courts do not specifically enforce the reference to arbitration and will not grant an injunction which would have the same effect [RUSSELL, *op. cit. supra* note 36, at 73], such injunction was granted in the above case to restrain a suit in a foreign country in violation of an arbitration agreement under the following facts. An agreement was made between an English company and a Belgian company, both doing business in Spain, for the construction of a railway. The contract stated that it should be construed and given effect as a contract made in England and in accordance with the law of England, that any disputes arising under the contract were to be referred to arbitration in conformity with the provisions of the English Arbitration Act of 1889, and that the award was to be a condition precedent to any liability of either party on the contract. The court held that it had power to restrain the suit abroad and that its power should be exercised under the facts of the case.

128. See p. 459, *supra*.

before any French court with respect to matters included in an arbitration agreement entered into in a foreign country between foreigners or between a Frenchman and a foreigner, without regard to the fact that it was a valid agreement under the law of the place where made.¹²⁹ The later cases, however, abandoned this strict policy and recognized the validity of these agreements.¹³⁰ The reason given for recognition was in both cases the principle of the autonomy of the will. Such agreements, when made in France between two foreigners or between a foreigner and a Frenchman, were recognized as valid if the arbitration was to take place abroad, or the parties intended that the contract should be governed by foreign law.¹³¹

Logically, under the principle of autonomy of the will, an agreement made in France between two Frenchmen should have been recognized as valid, if the parties clearly manifested their intention to submit the contract to a foreign law. The courts hesitated, however, to recognize the validity of a clause of this kind under these circumstances, but the Court of Cassation¹³² has recently declared that such an agreement would be upheld in a proper case.¹³³

The law of December 31, 1925, purports to authorize stipulations for the arbitration of future disputes in commercial matters. As this legislation lacks any detailed provisions¹³⁴ it

129. 3 LAPRADELLE AND NIBOYET, *RÉPERTOIRE DE DROIT INTERNATIONAL* (1929) 449, no. 4.

130. App. Poitiers, Oct. 28, 1907, (1908) 35 CLUNET 460; App. Alger, Dec. 27, 1907, (1910) 37 CLUNET 538; App. Rouen, May 6, 1908, (1909) 5 REVUE 178; App. Paris, Nov. 7, 1913, (1917) 44 CLUNET 590; App. Caen, Dec. 23, 1915, (1918) 45 CLUNET 180.

131. Cass. (Req.) July 17, 1899, (1899) 26 CLUNET 1024; App. Besançon, Jan. 5, 1910, (1910) 37 CLUNET 857; Trib. Civ. Lyon, July 30, 1913, (1914) 41 CLUNET 901; Cass. (Req.) Jan. 8, 1924, (1924) 51 CLUNET 974; App. Aix, Nov. 3, 1930, (1931) 26 REVUE 308.

132. Cass. (Civ.) Feb. 19, 1930, 25 REVUE 282 (1930), 26 *id.* 514 (1931).

133. See in general, Perreau, *De la Validité de la Clause Compromissaire insérée dans un Contrat passé à L'Étranger* (1910) 37 CLUNET 787; GODRON, *op. cit. supra* note 56; *La Clause Compromissaire dans les Rapports Internationaux devant les Tribunaux Français* (1919) 46 CLUNET 57, 654, Picard, *La Clause Compromissaire et L'Arbitrage dans les Rapports Internationaux* (1923) 50 CLUNET 508; André-Prudhomme, *supra* note 29.

134. The law consists of a single article and reads:

"Art. 631 of the Commercial Code is modified as follows: The courts of commerce are competent in the following cases:

"1. Controversies relating to transactions between merchants and bankers.

"2. Controversies between partners of a commercial company.

"3. Controversies relating to commercial matters between all persons.

"The parties may, however, at the time of concluding the contract agree

leaves in doubt many matters connected with commercial arbitration, both from a local and international point of view.¹³⁵ But, although constituting an amendment to Article 631 of the Commercial Code dealing with the jurisdiction of the French courts of commerce, it is not regarded as a procedural law and is therefore not applicable to contracts entered into prior to its enactment.¹³⁶

The jurisdiction of French courts with respect to the person is held to be a matter of privilege established in the interest of the individual which may be renounced by contract or otherwise.¹³⁷ Consequently, French courts recognize and enforce contracts conferring exclusive jurisdiction upon foreign courts, and any action brought in France in violation of such agreement will be dismissed. In a late case the Court of Cassation stated:

"Article 14 of the Civil Code, according to the terms of which a foreigner may be sued before the French courts on account of obligations contracted by him in a foreign country with respect to a Frenchman, is not a disposition of public policy, and may be waived by the interested parties."¹³⁸

Belgium. Differing from the earlier French attitude, the Belgian courts have declined to recognize contracts for the arbitration of future disputes (clause compromissoire) as being governed by Article 1006 of the Code of Civil Procedure, which

to submit to arbitrators any of the controversies above enumerated, should such controversies arise in the future." 1 NUSSBAUM 203.

See Palewski, *L'Arbitrage en Matière Commerciale et la Jurisprudence de la Cour de Cassation* (1933) 60 CLUNET 845; Hamel, *La Clause Compromissoire dans les Rapports de Commerce Internationaux*, (1922-23) 18 REVUE 721; LANDRAU, *L'ARBITRAGE DANS LE DROIT ANGLAIS ET FRANÇAIS COMPARÉS* (1932) 88 *et seq.*; André-Prudhomme, *supra* note 29.

135. For example, is the Act applicable where one of the parties is a foreigner? Professor André-Prudhomme is of the opinion that the French courts will give an affirmative answer. *Supra* note 29, at 70-71.

A decision of the Appellate Court of Aix concluded that an agreement to arbitrate was not binding under the law of 1925 unless it was entered into formally. App. Aix, March 2, 1929, Gaz. Pal. 1929, 2, 704, cited in 60 CLUNET 852. The law has been settled, however, in a contrary sense by the Court of Cassation. Cass. (Civ.) June 9, 1933, D. H. 1933, 164.

136. LANDRAU, *op. cit. supra* note 134, at 91-93. There have been some differences of view on the subject. But there is no suggestion that the proponents of the procedural view as regards retroactivity would regard the statute in the same light from the standpoint of the conflict of laws, so as to apply the *lex fori* to foreign contracts.

137. See NIBOYET, MANUEL DE DROIT INTERNATIONAL PRIVÉ (2d ed. Pillet & Niboyet, 1928) nos. 770, 780, 784.

138. Cass. (Req.) June 19, 1928, (1929) 56 CLUNET 336, 337.

specifically refers only to the submission of existing disputes (compromis).¹³⁹ Agreements for arbitration are governed, therefore, from the standpoint of the conflict of laws, by the ordinary rules applicable to contracts.

Germany. In view of the fact that agreements to arbitrate future disputes have been recognized throughout Germany since the adoption of the Code of Civil Procedure of 1877, it has become the established law that a valid arbitration agreement will constitute a defense to any suit brought in Germany in violation of such agreement.¹⁴⁰ In connection with this defense the courts will determine only whether the subject-matter of the suit falls within the scope of the arbitration agreement; when this appears the court must dismiss the suit.¹⁴¹

The law governing the validity of the arbitration agreement is not clearly defined.¹⁴² There is accord, however, on the point that notwithstanding the fact that some of the requirements for the validity of agreements for arbitration are contained in the Code of Civil Procedure, they are substantive in character. Contrary to the *Berkowitz* case, the Supreme Court of Germany has held that the provisions of the German Code of Civil Procedure relating to the validity of agreements for arbitration were not applicable to contracts entered into before the Code went into effect.¹⁴³

The question whether an order can be had compelling the defendant to proceed to arbitration does not appear in any of the reported decisions that have been found. In view of the fact, however, that under German law the remedy of specific performance of contracts is the normal one,¹⁴⁴ it would seem that it should be available for the breach of arbitration contracts. But where suit is brought in a foreign country in violation of an agreement for arbitration, the German courts have

139. Cass. Belg. June 8, 1849, Pas. 1850, pt. 1, 81; GODRON, *op. cit. supra* note 56, at 94-95n.

140. CODE CIV. PROC. § 274, par. 2, no. 3.

141. OLG Munich, Oct. 4, 1911, 25 OLG 94.

142. See Supreme Court, Nov. 8, 1882, 27 GRUCHOT 1053.

To the effect that the law governing the award should control, see Jonas, *Anerkennung und Vollstreckung ausländischer Schiedssprüche* JW (1927) ; 2 STEIN-JONAS, *DIE ZIVILPROZESSORDNUNG FÜR DAS DEUTSCHE REICH* (14th ed., Jonas, 1929) 1085.

To the effect that the validity of the arbitration clause depends upon the law governing the main contract, at least in case of doubt where the main contract is void, see Neuner, *Zum Problem der ausländischen Schiedssprüche*, 3 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (1929) 43, n. 6; also, Nussbaum, *supra* note 74, at 17 *et seq.*

143. Supreme Court, Nov. 10, 1881, 38 SA 158.

144. See CIV. CODE § 249.

no jurisdiction to grant an injunction.¹⁴⁵ Neither do the German courts have the power to appoint an arbitrator where the contract calls for arbitration in a foreign country.¹⁴⁶

The rules relating to jurisdiction over the person are regarded in Germany also as laid down for the benefit of individuals, and may be waived by them. Contracts conferring exclusive jurisdiction upon foreign courts are therefore recognized on principle as valid.¹⁴⁷

Italy. Article 69 of the Italian Code of Civil Procedure provides that "The jurisdiction [of courts] cannot be prorogued by the parties, except in the cases established by law." The rules governing jurisdiction are regarded as matters of public policy, involving the sovereignty of the state and the freedom of individuals. Any contract attempting to oust the jurisdiction of the Italian courts is therefore null and void. This has been held to be true even where the contract was one between two Italians contracting abroad.¹⁴⁸ The same conclusion has been reached in the case of contracts made in Italy between an Italian and a foreigner.¹⁴⁹ A minority holding considers a stipulation conferring jurisdiction on a foreign court as invalid only in cases with respect to which the Italian courts have exclusive jurisdiction.¹⁵⁰ It is recognized, on the other hand, that foreigners may confer jurisdiction on the Italian courts in cases other than those specified in Articles 105-106 of the Italian Code of Civil Procedure.¹⁵¹

Agreements for arbitration in a foreign country have given rise to much contrariety of view among the Italian courts. These differences result in part from antagonistic theories en-

145. Kahn, *Arbitration in England and Germany* (1930) J. COMP. LEG. 228, 241.

146. OLG Rostock, Sept. 23, 1915, 33 OLG 140. Where there is an express agreement that the arbitration shall be held in Germany and is to be subject to German Law, or the parties have deemed to have contracted with reference to German law, the German provisions relating to the appointment of arbitrators are applicable, without reference to the law of the domicile or to the national law of the contracting parties. OLG Hamburg, May 27, 1914, 29 OLG 283.

147. OLG Colmar, March 31, 1903, 6 OLG 384; OLG Dresden, May 30, 1904, 9 OLG 51; see also Supreme Court, May 16, 1926, JW (1926) 1336, and KG, Feb. 6, 1926, JW (1926) 1353; Lorenzen, *The Conflict of Laws of Germany* (1930) 39 YALE L. J. 804, 825-827.

148. App. Milan, Apr. 23, 1927, (1928) RIV. DIR. INT. 110.

149. Cass. del Regno, March 16, (1926) RIV. DIR. INT. 385; March 15, 1927, (1927) RIV. DIR. INT. 389; Carnelutti, *Clausole di Rinunzia alla Giurisdizione Italiana* (1923) 89 ARCH. GIUR. 172.

150. App. Naples, Feb. 13, 1925, (1925) RIV. DIR. INT. 546; Cavaglieri, *Lezioni di Diritto Internazionale Privato* (3d ed. 1933) 368; Rocco di Torrepadula, *La Proroga della Giurisdizione Italiana nel Diritto Internazionale Processuale* (1932) RIV. IT. DIR. INT. PRIV. & PROC. 553.

151. Cass. Jan. 24, 1927, (1928) RIV. DIR. INT. 249.

tertained by Italian writers and courts concerning the nature of arbitration agreements.¹⁵² Prior to the decree of July 20, 1919, the courts were practically unanimous in holding such agreements for foreign arbitration to be invalid where the contract containing the arbitral clause was between Italian subjects and was to be performed in Italy.¹⁵³ No agreement existed where both parties were foreigners or one of the parties an Italian and the other a foreigner. Some courts held such agreements for arbitration to be valid;¹⁵⁴ others that they were valid only if the agreement was made or to be performed abroad or if the parties had their domicile abroad.¹⁵⁵ The 1919 decree authorized the enforcement of foreign awards between foreigners or between an Italian and a foreigner, but denied recognition to foreign awards between two Italian subjects. The question whether it validated by implication agreements for arbitration between an Italian and a foreigner where the contract was made in Italy and called for arbitration abroad, was further complicated by the Geneva Protocol on Arbitration Clauses. This Protocol, adopted September 24, 1923, provided for the recognition of agreements for arbitration between parties belonging to different Contracting States, whether or not the arbitration was to take place in a third country. Although ratified by Italy on July 28, 1924, it was not enacted into law until May 8, 1927, and the issue arose as to whether the new policy indicated by the previous ratification might be taken into consideration by the Italian courts prior to the establishment of the Protocol as positive law.¹⁵⁶ During this period, 1919–

152. Some courts draw inferences from Art. 22, Code of Civ. Proc., providing that arbitration awards must be pronounced in Italy. Others rely on Arts. 105–106 of the Code of Civ. Proc. specifying the instances in which the Italian courts have jurisdiction over foreigners.

153. Cass. Turin, Sept. 9, 1914, (1914) MON. 844 (not clear where to be performed); May 17, 1918, (1918) MON. 369; June 6, 1919, (1919) MON. 814; June 17, 1919, (1919) MON. 421. App. Milan, Oct. 23, 1917, (1918) MON. 49; July 30, 1918, (1918) MON. 569. Cass. del Regno, Apr. 8, 1927, (1927) RIV. DIR. INT. 387 (contract made in Italy and to be performed partly in Italy and partly abroad). But see Cass. Palermo, Feb. 23, 1912, (1912) MON. 752.

154. Cass. Rome, Feb. 5, 1909, (1909) MON. 645; App. Milan, Sept. 23, 1913, (1914) MON. 135 (contract made or to be performed in Italy); App. Milan, Feb. 27, 1917, (1917) MON. 782 (contract to be performed in Italy).

155. App. Milan, July 30, 1918, (1918) MON. 569 (valid where domicile abroad); Cass. Turin, June 17, 1919, (1919) MON. 421 (invalid if to be performed in Italy); App. Genoa, June 17, 1922, (1923) MON. 507 (invalid if to be performed in Italy); Cass. Turin, Aug. 30, 1923, (1924) MON. 87 (valid where part performance abroad).

156. See Sereni, *Sulla Validità e gli Effetti della Clausola Compromissoria per Arbitrato Estero* (1931) RIV. DIR. INT. 394; Betti, *Sulla Validità della Clausola Compromissoria per Arbitrato Estero Secondo il Diritto Italiano* (1927) 2 RIV. DIR. PROC. CIV. 266.

1927, the decisions of the Italian courts were in a state of great confusion, those of the Court of Cassation of the Kingdom being themselves inconsistent with one another.¹⁵⁷

That the law of May 8, 1927, has not changed the Italian attitude with regard to agreements for arbitration in general but exerts only a limited influence with respect to the Contracting States, is indicated by a recent decision of the United Chambers of the Court of Cassation of the Kingdom.¹⁵⁸ The question arose with respect to a contract for arbitration entered into by an Italian and a Brazilian, calling for arbitration in Brazil. The Appellate Court of Naples held the contract valid, notwithstanding the fact that the Geneva Protocol had not been ratified by Brazil.¹⁵⁹ But the highest court reversed the decision, on the ground that the Italian law had been modified only within the limits of the Protocol, that is, with respect to nationals whose countries had ratified the Geneva Protocol.

The law governing the validity of arbitration agreements is discussed by the Court of Cassation of the Kingdom¹⁶⁰ in a case in which the contract was made in Italy between an Italian and a Brazilian firm and provided for arbitration in Italy. The Court said:

"The law of the country where this arbitration agreement was concluded applies without doubt to its validity, as follows from Article 9 of the Introductory Provisions to the Code of Civil Procedure."¹⁶¹

157. In favor of validity: Cass. del Regno, Nov. 10, 1926, (1927) *MON.* 204; Apr. 22, 1927, (1927) *RIV. DIR. INT.* 388; May 18, 1927, (1927) *MON.* 561; June 4, 1929, (1929) 54 *REP. FORO IT.*, under *Arbitramento*, no. 5.

Against validity: Cass. Regno, March 16, 1925, 1 *NUSSBAUM* 336; Apr. 8, 1927, (1927) *RIV. DI DIR. INT.* 387.

See note by Ascarelli, 2 *NUSSBAUM* 333; Betti, *supra* note 156.

An agreement entered into in Italy between an Italian and a citizen of Switzerland for submission to foreign arbitration is valid under the Geneva Protocol of 1923, although the Swiss was a resident of Italy, Italy and Switzerland having both adhered to the Geneva Protocol. Cass. del Regno, March 15, 1932, (1932) 57 *FORO. IT.* 1932, pt. 1, 538, and note by Cavaglieri.

158. Jan. 22, 1931, (1931) *RIV. DIR. INT.* 392, and note by Sereni, (1931) *RIV. IT. DIR. INT. PRIV. & PROC.* 185, and note by Cereti.

159. App. Naples, July 22, 1929, 3 *NUSSBAUM* 385.

160. Cass. del Regno, Jan. 28, March 16, 1925, 1 *NUSSBAUM* 336.

161. *Id.* at 337. Art. 9 of the Introductory Provisions to the Italian Civil Code provides as follows:

"The substance and effects of obligations are governed by the law of the place in which the acts were done, and, if the parties have the same nationality, by their national law; excepting in each case proof of a will to the contrary."

Art. 13 of the Draft of the New Italian Code contains the following provision: "Obligations arising from contracts are governed by the law

It was held that the agreement was invalid under Italian law.

Sweden. Of particular interest are the provisions of the conflict of laws adopted in Sweden by the Law of June 14, 1929.¹⁶² Under them, if a suit is brought in Sweden on a dispute falling within a valid agreement for arbitration, the action will be dismissed.¹⁶³ It matters not whether the agreement for arbitration may be regarded as a Swedish one or a foreign one. Where the agreement for arbitration specifies the place where the arbitration is to take place, the law of that state or country will determine the validity and effect of the agreement.¹⁶⁴ Where the place of arbitration does not appear, Swedish law will apparently govern if both parties, or one of them, is domiciled in Sweden.¹⁶⁵ If both parties are domiciled outside of Sweden, the rule of the conflict of laws governing the validity and effect of the agreement is not indicated, but recognition of the foreign arbitral agreement, valid under the proper law, will be refused in Sweden on grounds of public policy, if the dispute is one that could not be submitted to arbitration under the local Swedish law.¹⁶⁶

Proceedings for arbitration may be instituted in Sweden and the aid of the Swedish courts obtained if arbitration is to take place in Sweden; so also where the agreement does not specify the country in which arbitration is to take place, if both parties or one of the parties is domiciled in Sweden. If only one of the parties has his domicile in Sweden at the time of the making of the agreement, or has established his domicile there subsequently thereto, proceedings can be brought in Sweden against the party domiciled therein, but not against the other party.¹⁶⁷

It seems therefore that where the contract calls for arbitration abroad, the Swedish courts will not entertain jurisdiction to compel the parties to proceed to arbitration, nor to appoint an arbitrator; nor will they do so where the contract is silent with respect to the place of arbitration and suit is instituted against a party who is domiciled in some country other than Sweden.

Geneva Protocol on Arbitration Clauses. This Protocol, signed at Geneva under the auspices of the League of Nations,

to which the parties have expressly referred. In the absence of an express declaration that law will control which the parties are presumed to have chosen in view of the provisions of the contract and the surrounding circumstances."

162. The text may be found in German in 3 NUSSBAUM 269, 274 §§ 1-4.

163. *Id.* § 3.

164. *Id.* § 2.

165. *Id.* § 4.

166. *Id.* § 3.

167. ARBITRATION LAWS, *supra* note 61, § 4.

on September 24, 1923, seeks to facilitate international arbitration in civil and commercial matters.¹⁶⁸ Although it provides for the recognition of agreements to arbitrate both existing and future disputes, "whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject," it is for some seemingly insufficient reason limited by Article 1 to parties of different Contracting States and does not include agreements between nationals of one Contracting State for arbitration in some other Contracting State. Moreover, a Contracting State can under Article 1, paragraph 2, stipulate for a limitation of the Protocol as to it to commercial contracts and a number of ratifying nations have taken advantage of this reservation.¹⁶⁹

The Protocol does not specify what law should determine the validity of agreements for arbitration. The arbitral proceedings themselves, however, including the constitution of the arbitral tribunal, are, under Article 2, governed by the law of the country in whose territory the arbitration is to take place, unless the parties have agreed otherwise.¹⁷⁰

The object of the Protocol, which has now been ratified by Great Britain and nearly all of the continental countries,¹⁷¹ was to prevent any action from being brought in any Contracting State between nationals of different Contracting States on a contract containing an arbitration clause. According to Article 4, if a suit is brought contrary to the terms of the agreement, the court shall refer the parties to the decision of the arbitrators, except in the case where the arbitration cannot proceed or has become inoperative. The duty to enforce awards under the Act is limited to local awards.¹⁷² The enforcement of awards of other Contracting States is provided for in the Geneva Convention on the Execution of Foreign Arbitral Awards, of September 26, 1927.¹⁷³

IV

ARBITRATION LAW—SUBSTANTIVE OR PROCEDURAL?

The foregoing account, though confined to the law of a few of the leading commercial countries of the world, gives some

168. League of Nations Publications II, Economic and Financial, (1928) no. 5. The text may be found also in RUSSELL, *op. cit. supra* note 36, at 517; 1 NUSSBAUM 239.

169. 1 NUSSBAUM 239.

170. Art. 2.

171. 1 NUSSBAUM 239; 2 NUSSBAUM 237; 3 NUSSBAUM 301.

172. Art. 3.

173. 2 NUSSBAUM 237.

conception of the present complexity of the law governing commercial arbitration in its international and interstate aspects. Not only are there wide differences among the individual continental countries, but also between England and the United States. One thing stands out above all else, namely, that from the standpoint of the conflict of laws the attitude of the United States toward commercial arbitration is not shared by any other country, not even Great Britain. The dominant point of view in our law is that agreements for arbitration relate to procedure or remedy.

Judge Cardozo gave prominence to this view in his concurring opinion in the *Meacham* case,¹⁷⁴ and in voicing for the majority of the court in *Matter of Berkowitz v. Arbib & Houlberg*¹⁷⁵ the opinion that the New York Arbitration Act was procedural in character. The New York Act has also been held to be procedural by the Supreme Court of the United States in *Red Cross Line v. Atlantic Fruit Co.*¹⁷⁶ The problem before the Supreme Court was whether agreements for arbitration of disputes arising under maritime contracts (a charter party) were within the scope of the New York Arbitration statute, and whether, if so construed and applied, the state law conflicted with the Constitution of the United States. In holding that the controversy was not within the exclusive jurisdiction of admiralty and that the New York courts had the power to compel the charter owner to proceed to arbitration, Mr. Justice Brandeis made the following observations: "The Arbitration Law (of New York) deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty."¹⁷⁷ Clearly, the Supreme Court was of the opinion that the application of the New York Arbitration Act to maritime law would not interfere with the "uniformity doctrine" established by a majority of the Supreme Court in the *Jensen* case.¹⁷⁸

No issues in the conflict of laws were presented either in *Matter of Berkowitz v. Arbib & Houlberg* or in *Red Cross Line v. Atlantic Fruit Co.* In the former the question before the court was one of the retrospective application of the New York Arbitration Act. If the answer to this question, in the absence of an express declaration on the part of the legislature, depended

174. *Supra* note 79.

175. *Supra* note 82.

176. *Supra* note 100.

177. *Id.* at 124.

178. *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917).

upon the "substantive" or "procedural" character of the legislation, it does not follow that the line drawn by the majority of the court should be the same for purposes of the conflict of laws. The mere fact that the majority labelled the statute as "procedural," in order to make it applicable to contracts entered into before the passage of the statute, should not cause the same label to be attached to the statute in connection with conflict of laws problems. Nor does it necessarily follow from the fact that the Supreme Court of the United States also regarded the New York Arbitration statute as procedural so far as the "uniformity doctrine" in admiralty is concerned, that it should be so classified from the standpoint of the conflict of laws.¹⁷⁹

Professor Cook has called attention in a recent article¹⁸⁰ to the confusion caused by attaching the label "substantive" or "procedural" without reference to the type of question before the court. The mere fact that a statute has been held procedural for one purpose does not make it incumbent upon the court to attach to it the same construction for some other purpose. Professor Cook enumerates eight groups of cases in connection with which the problem may arise and with respect to them says:

"Only after the most careful consideration ought it to be concluded that decisions relating to one of these problems are to be followed as 'precedents' for the decision of cases in another group. This is not to say that they ought to have no weight at all; far from it. It is merely to point out that at most they make out a *prima facie* case, and even that is perhaps to overstate the case for their use as precedents in really doubtful cases involving different purposes."¹⁸¹

Attention has been called elsewhere¹⁸² to the fact that Anglo-American courts have been inclined to give too wide a meaning in the conflict of laws to the term "procedure." Difference of opinion may fairly exist with regard to the line which should be drawn in some instances between procedure and substance. For example, the statute of limitations is generally regarded in Anglo-American Law as procedural and in continental coun-

179. In a number of cases in which arbitration statutes were held to be procedural the immediate issue before the court was the enforceability of a state arbitration statute by the federal courts, which is again a problem by itself.

180. Cook, "*Substance*" and "*Procedure*" in the Conflict of Laws (1933) 42 YALE L. J. 333.

181. *Id.* at 344.

182. Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311.

tries as substantive. American courts disagree as to whether the statute of frauds should be deemed procedural or substantive. The same disagreement exists also with respect to presumptions and the burden of proof. Much confusion could have been avoided if our courts had followed Professor Cook's suggestion that the line between substance and procedure should be consciously drawn with especial reference to the purpose to be sought. Another source of confusion in this country results from the fact that the "procedural" and public policy arguments are frequently used interchangeably. Where the local law of the forum has severer requirements than that of the foreign state or country, the result obtained is, of course, the same; but fundamentally different conclusions are reached where the requirements of the law of the forum are less severe or simply different from those of the state or country in which the cause of action had its origin. In this situation the parties may have no right or cause of action under the law of the foreign state or country but would have one by the *lex fori*; or the reverse may be true, that is, the parties may have a right by the law of the foreign state or country and none by the law of the forum, when the differences of law are not of such a fundamental character that the public policy argument would be available from the standpoint of the conflict of laws.

The arbitration statutes thus present two problems, first, whether from the point of view of the conflict of laws they should be classified as procedural; and, second, if they are not procedural, to what extent, if any, effect may be denied them on the ground that their recognition and enforcement would conflict with the public policy of the forum. At the time of the decision of the *Meacham* case, common-law agreements for arbitration were not enforceable in this country, except in Pennsylvania. Hence it is not surprising that the New York Court of Appeals was of the unanimous opinion that the Ohio contract, which was to be wholly performed in Pennsylvania, could not be recognized in New York. As agreements for arbitration would "oust the jurisdiction of the courts," and such agreements were regarded practically universally in this country as opposed to public policy, it was natural that such policy should be held to extend to foreign contracts, enforceable by the proper law.

But if the public policy argument had been the only one to prevent the enforcement of the foreign contract in the *Meacham* case, a different result would be reached today in New York as a result of the Arbitration Act of 1920, which has changed the policy of that state with respect to arbitration. In states retaining the revocability doctrine, the question would

be whether their local policy should be regarded as still of such paramount importance that it should prevent the recognition and enforcement of agreements for arbitration made elsewhere and valid under the proper law, or whether in view of the modern general trend in favor of arbitration the local point of view should yield in favor of the larger policy of giving effect to agreements for commercial arbitration.¹⁸³ If a foreign contract for the submission of future disputes to arbitration, valid where made, should come before the courts of a state which has no modern statute authorizing such agreements but which regards the submission of existing disputes as irrevocable, it would seem that the public policy argument against the enforcement or recognition of the agreement would be without solid foundation; for under these circumstances the difference between the two types of legislation should not be regarded as so fundamental as to make it a matter of public policy in the international sense.

The problem assumes quite a different aspect if arbitration statutes are to be classified as procedural for conflict of laws purposes, and leads the writer to conclude that they should not be so classified.¹⁸⁴ It seems to him that too much stress has been laid on the argument that agreements for arbitration were valid at common law and lacked only enforceability which the modern statutes have supplied. Even from a technical point of view, it would seem a new right has been created instead of merely an additional remedy being added to an existing right. Formerly the contract was said to be "valid" but either party could withdraw from it at pleasure before the award was rendered; suit might be brought for damages, but these would normally be only nominal; whereas under the modern arbitration acts, the rights of the parties have become irrevocable. This transformation of a revocable right to one that is irrevocable must certainly be deemed to go to the substance instead of merely to the remedy.

Ultimately the question should be answered from a broader point of view. With the enactment of the modern statutes favoring the arbitration of commercial disputes, the question has become one of the attitude which the courts will adopt toward this movement. Traditionally our courts have been opposed to arbitration agreements, but is there any sound reason why this

183. Cardozo, J., in *Loucks v. Standard Oil Co. of New York*, 224 N. Y. 99, 120 N. E. 198 (1918).

184. See also Heilman, *Arbitration Agreements and the Conflict of Laws* (1929) 38 YALE L. J. 617; Corbin, *Conditional Rights and Functions of an Arbitrator* (1928) 44 L. Q. REV. 24; Baum and Pressman, *supra* note 100, at 449; and notes in (1928) 28 COL. L. REV. 472; (1933) 33 COL. L. REV. 1440; (1929) 42 HARV. L. REV. 801, 804; (1933) 47 HARV. L. REV. 126, 315.

attitude should be perpetuated notwithstanding the modern arbitration statutes? Why should arbitration agreements be singled out in the conflict of laws from all other agreements and subjected to the local law of the forum? Other contracts made or to be performed in another state or country are governed by the proper law and, if valid, will be recognized and enforced, unless, under exceptional circumstances, such recognition and enforcement should violate the public policy (in the international sense) of the forum. On the other hand, if the contract is invalid by the proper law it will not be recognized and enforced by the law of the forum, notwithstanding the fact that under the local law the contract would be valid. Why should contracts for arbitration form an exception to this rule? It is important from the standpoint of commercial arbitration that the rights of the parties should be governed by some definite law, instead of being determined by the law of the state where the plaintiff may happen to bring the suit.¹⁸⁵ Contracts to submit disputes to arbitration differ, of course, from other contracts in that the statutes applicable thereto contain procedural elements. But these are incident to the performance of the contract and not to its inception. So far as the validity of the contract is concerned, it should be dealt with from the same standpoint as are all other contracts. It should be governed by its proper law, which should be determined with reference to the peculiar requirements of this type of contract. This is the English point of view as expressed by Lord Herschell in *Hamlyn & Co. v. Talisker Distillery*¹⁸⁶ and it should be ours.

Classification of arbitration statutes as procedural or remedial leads to positively harmful results. Prior to the modern arbitration acts the consequence of calling these statutes procedural was the refusal of our courts to recognize agreements for arbitration, valid and enforceable under the proper law. As the courts of practically all of our states were opposed to such agreements at that time, the result seemed to express the general policy of this country. Today the situation is greatly changed. In a dozen of our states, including the leading commercial states, arbitration agreements for the submission of future disputes are enforceable at the present time, the legislatures in these states having changed the policy formerly expressed by our courts. The logical effect of the view that these statutes are procedural would make the law of the forum applicable without regard to the law of the state or country where such contract was made or the arbitration was to take place. A contract for arbitration would be enforceable in New York, if

185. The confusion resulting from the *lex fori* doctrine appears very vividly from Phillips, *supra* note 97.

186. *Supra* note 116.

personal service could be had on the defendant, although it was made and the arbitral tribunal was to sit in a state or country where the contract remained unenforceable. In the absence of other considerations, a stay and an order to compel arbitration would be granted.¹⁸⁷ And a contract for arbitration made in one of the states in which a modern arbitration act exists and providing for arbitration in such a state would be unenforceable if the defendant lived in a state where such contracts are not enforceable and no jurisdiction could be had over him in a state having a modern act. In other words, the enforceability or unenforceability of the contract would depend primarily upon plaintiff's ability to obtain jurisdiction over the defendant in a state having a modern arbitration statute, without reference to the circumstances existing at the time of the making of the agreement. Provision in the arbitration statutes authorizing ex parte arbitrations might enable the proceedings to continue though no personal service could be had over the other party, provided no appointment of arbitrators by the court was required.¹⁸⁸ Courts following *Leroux v. Brown*,¹⁸⁹ it is true, have reached this result, which the writer regards as untenable and improper,¹⁹⁰ where the defense to a contract was the statute of frauds. But however that may be, it is certain that an extension of the doctrine to arbitration agreements would prevent the proper development of commercial arbitration from an interstate and international point of view.¹⁹¹ The only proper and legitimate position is that the difference in the legislation on the subject of agreements for arbitration is one relating to the substantive rights of the parties, and that these contracts should be governed in the conflict of laws by their proper law, subject to the rules of public policy of the forum. This is the view accepted in England and in all other countries, including Italy, where the law is opposed on principle to stipulations ousting the jurisdiction of the Italian courts.

V

THE GOVERNING LAW

Granted, then, that an agreement for arbitration creates substantive rights, the question arises what law should govern

187. The state courts have granted a stay but some have refused to order the parties to proceed to arbitration in another state. See pp. 731-732, *supra*.

188. Phillips, *supra* note 97, at 222 *et seq.* (1934).

189. 12 C. B. 801 (1852).

190. Lorenzen, *supra* note 182, at 320 *et seq.*

191. Phillips, *supra* note 97, at 235-236.

its validity from the standpoint of the conflict of laws. Is it to be governed by the intention of the parties or by some fixed rule of law? If the latter, is it to be determined by the law of the state or country where the contract is made, or where the arbitration is to take place, or is it to be controlled by the law of the common domicil or common nationality of the parties, or possibly by some other law? As far as ordinary contracts are concerned, support can be found for any of these propositions.¹⁹² Most of the courts seem divided between the law of the place of contracting and the law of the place of performance. On the continent the statement must be qualified by limiting it to matters affecting validity other than capacity and formalities. As regards capacity the personal law (generally the law of domicil or national law) controls, except that in commercial contracts a disability existing under the foreign personal law may be disregarded in the interest of commercial security if it does not exist under the local law.¹⁹³ The contract is regarded as valid from the standpoint of formal requisites if it satisfies the law of the place of contracting.¹⁹⁴ Frequently it is valid also if it complies with some other law, as for example in Germany¹⁹⁵ the law of the place of performance. Much effort has been expended in the attempt to find a uniform rule applicable to all contracts, but it must be recognized that this is futile and that the special requirements of particular contracts should be considered. The fundamental requirement of our law at the present moment is that the rules of the conflict of laws which have been handed down to us shall be cast into a more liberal and flexible mould in order that it may be possible for our courts to take into consideration all economic or social factors bearing upon the problem. Whether the case before the court contains conflict of laws elements or not, the ultimate goal is the same, namely, the reaching of a decision that will satisfy the sense of justice of the community.

As regards arbitration agreements it would seem that where the parties have designated the place of arbitration, the courts should normally look to the law of the state or country so designated. It is highly desirable that an award that is properly rendered should be recognized and enforced in other countries. Now it is clear that in the very nature of things the law of the place where the arbitral court is to sit figures prominently in

192. LORENZEN, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565.

193. LORENZEN, *CASES ON THE CONFLICT OF LAWS* (3d ed. 1932) 333-335n.

194. *Id.* at 345n.

195. *Ibid.*

the matter of commercial arbitration. It will be binding upon the arbitrators, at all events as to any procedural matters not covered by the arbitration agreement. If judicial aid is required, such aid will of necessity be given in accordance with the law of that state. The award as such must satisfy the requirements of the law where it is rendered unless the parties have validly provided otherwise. Convenience would suggest, therefore, that the validity of the arbitration agreement be regarded in general as subject to this law. Most of the writers who have given special attention to this problem have been forced to this conclusion, notwithstanding their divergent views regarding the law governing contracts in general.¹⁹⁶ Sweden has accepted the same view by statute.¹⁹⁷ It would seem that the law of the place of arbitration should also govern where such place, although not specifically designated by the parties, is ascertainable from the circumstances of the case.¹⁹⁸

But the question of the manner in which the validity of arbitration agreements is to be determined in the place of arbitration is not indicated directly in the agreement or by the surrounding circumstances involves greater difficulty. The Swedish statute¹⁹⁹ provides that where one of the parties at the time of the execution of the contract is domiciled in Sweden, Swedish law will control; the arbitration agreement can be enforced in Sweden against the party domiciled there, but not against the other party. In this country the *lex domicilii* has been discarded so far as commercial contracts are concerned, even in the matter of capacity, because of the difficulty involved in determining questions of domicile.²⁰⁰ The same objection may be raised against the application of the law of domicile in the matter of commercial arbitration, so that our courts would probably look to the *lex loci contractus*. If the agreement specifically provides that the arbitration shall be governed by the law of a particular state or country, other than the law that

196. Note 142, *supra*.

197. See p. 749, *supra*.

198. Under what circumstances, if any, it might be advisable to allow the courts to consult in addition some other law, such as the law of the place where the arbitration agreement was made, need not be discussed at this point. In continental law the maxim *locus regit actum* is firmly embedded, according to which the validity of agreements is recognized, as regards formal requisites, if the *lex loci contractus* is satisfied. There would be no objection, of course, if arbitration agreements were everywhere sustained on this basis. Exclusive rules may not always produce the best results. See Lorenzen, *supra* note 192, at 671 *et seq.*

199. See p. 489, *supra*.

200. See *Nichols & Shepard Co. v. Marshall*, 108 Iowa 518, 79 N. W. 282 (1899).

would normally apply, the courts of the forum should give effect to the intention of the parties, provided the law chosen has a reasonable connection with the facts of the case and the enforcement of the particular provision is not opposed to the public policy of the forum.

The law of the place of arbitration should determine also the revocability of the agreement and all substantive rights and duties derived therefrom. Thus it would seem clear that the powers and duties of the arbitrators should be governed with reference to this law. Where the arbitration is to take place in a foreign country, one of the important questions would be, in the absence of a specific provision in the agreement, whether the arbitrators are to be bound by the ordinary rules of law or whether they are free to follow their own conception of justice and right.

The validity of foreign agreements for arbitration, valid by the proper law, would not be recognized, in accordance with the general exception found in the conflict of laws, if they came into conflict with the public policy of the forum. For example, all courts would decline to enforce the arbitration clause if it were contained in a gambling contract, the enforcement of which would be deemed contrary to the public policy of the forum. The courts might agree also with the provision in the Swedish statute,²⁰¹ although there would seem little room for the application of this exception in the field of commercial arbitration, that the foreign agreement would not be recognized if the matter in dispute could not be submitted to arbitration under the local law of the forum. Countries like Germany having a requirement that the arbitration clause must refer to some "definite legal relationship"²⁰² might regard the requirement as one of international public order so as to defeat any foreign contract, valid by the proper law, if it violated such provision. On the other hand, it is submitted that the Supreme Court of Austria clearly went too far in the matter of public policy in declining to recognize the validity of an oral agreement for arbitration made in Germany and valid by German law, for the reason that the Austrian law required a writing.²⁰³

There remain to be considered the effects of a valid arbitration agreement, whether domestic or foreign, when the substantive character of such agreements is granted. One effect would be that the parties cannot resort to the ordinary courts for the settlement of any dispute falling within the scope of the agreement. Except in states which regard the recognition

201. See p. 489, *supra*.

202. See p. 460, *supra*.

203. Supreme Ct. of Austria, March 8, 1904, 1 NUSSEBAUM 350.

and enforcement of arbitration agreements, both local and foreign, as opposed to public policy, any proceedings brought in violation of the arbitration agreement, would, upon motion, be stayed. Whether or not such a stay is mandatory when it appears that the agreement is valid and the dispute within the terms of the agreement, would seem to relate primarily to the organization of courts and the power of judges, and should be controlled, therefore, by the law of the forum, rather than by the law governing the contract. As a matter of local law it would be desirable if American courts were given some discretionary power with respect to the granting of stays. When granted, an order should provide that unless the arbitration is held within a reasonable time an application may be made to the court for its revocation.²⁰⁴

Another effect of a valid agreement for arbitration is that it imposes a duty upon the parties to take whatever steps may be necessary to carry out the agreement. If the contract provides for arbitration in the state of the forum and jurisdiction can be had over the defendant, the availability of the remedy of specific performance will be governed by the law of the forum. In some countries there is a reluctance to grant specific performance in any case; in others it is the normal remedy for the breach of all ordinary contracts.²⁰⁵ Here again, as a matter of local law, some discretionary power should be vested in the courts. If the recalcitrant party cannot be served in the state, *ex parte* arbitration should be allowed, provided the agreement calls for arbitration in that state and no assistance is necessary on the part of the courts in the appointment of arbitrators.

Where the contract provides for arbitration in another state or country, the granting of a stay and of an order to compel raises additional problems. In foreign countries courts are frequently without power to order arbitration abroad. In this country courts of equity have frequently declared that they have no power to order the defendant who is before the court to do a positive act abroad.

A more accurate way of stating the American law would be that the power exists, but that it will not be exercised except where it seems necessary and proper. Under the existing legislation, which makes both the stay and order to compel manda-

204. Phillips, *supra* note 97, at 221. See *Ring v. Menger, Ring and Weinstein, Inc.*, N. Y. L. J. Aug. 14, 1925, where the order read as follows:

"Motion for a stay is granted, but with leave to plaintiff to move to vacate such stay if defendants fail to give notice of the appointment of an arbitrator within ten days after service of this order, or if the arbitration is otherwise unduly delayed."

205. GERMANY, CIV. CODE § 249.

tory, our courts may well hesitate before ordering a foreign arbitration, even though they have the power to do so. The bargaining power of the parties may not have been equal and the provision for arbitration in some other state or country may appear to the court to be unfair or too onerous as to one of the parties,²⁰⁶ or the agreement may provide for arbitration in a state or country where the courts will not lend their aid in carrying out the agreement. Again, it may be impossible to obtain personal jurisdiction over the recalcitrant party in the other state or country and there may exist no authorization there for ex parte arbitrations. The situation forcibly indicates the necessity that the courts have a certain discretionary power in an application for a stay or for an order to compel, and also the desirability of a statutory provision that where a submission agreement provides for arbitration in the state the courts thereof shall have irrevocable power to order the arbitration to proceed.²⁰⁷ The fact that both parties are citizens of the state of the forum has been held in *Matter of Inter-Ocean Food Products, Inc.*²⁰⁸ to be a sufficient reason for denying the remedy of specific performance where the arbitration is to take place in some other state. But it is submitted that citizenship or residence as such should not be the determining factor in the solution of the problem. If two citizens of a state have agreed to arbitrate in some other state, they should be subject to the compulsory process of the law of the state to the same extent as citizens of other states, or non-residents in general.²⁰⁹

There would appear to be no sufficient reason for the distinc-

206. Judge Hough called attention to this problem in *Atlantic Fruit Co. v. Red Cross Line*, *supra* note 101, at 221, where he said:

"The situation above depicted is beyond all question one that calls for remedial action. Yet those recognizing the evil, recognize also the difficulty of devising a remedy suitable to agreements like charter parties, made in all parts of the world, to be performed on any waters and where the natural, yet tyrannical inclination of the stronger party to the bargain will be to insert a clause requiring arbitration in his own 'home town.'"

207. Such provision, however, would be effective only if it is not necessary to apply to the court for the appointment of an arbitrator, for which personal service is required. Phillips, *supra* note 97, at 221.

208. *Supra* note 85.

209. One of the arguments advanced under the existing legislation in this country against the power of the court to order arbitration in another state has been that the foreign award would not be enforced in the simplified manner provided for local awards. See *In re California Packing Corp.*, *supra* note 85. Such a difference in the enforcement of foreign and local awards should not affect, however, the power of the court to issue an order to compel, and if it seemed desirable to facilitate the enforcement of foreign awards, this could be done by a statute in an appropriate way.

tion made by some courts²¹⁰ between the granting of a stay and an order to compel. In allowing a stay of trial and refusing the order to proceed with the foreign arbitration, there is danger that the party staying the proceeding may escape all liability on the main contract by failing to arbitrate and remaining outside the foreign jurisdiction designated as the place of arbitration. Such party should be required therefore to post a bond that he will proceed with the foreign arbitration, as a condition precedent to the granting of the order for a stay,²¹¹ or the order should provide that unless the arbitration is held within a reasonable time an application may be made for a revocation of the order. A similar bond may be required on an application for an order to compel arbitration abroad.

A further question relates to the circumstances in which the courts of a state should render active assistance in arbitration proceedings, as for instance, by appointing arbitrators. Such power relates to the local organization of courts and must be exercised in conformity with the law of the forum, regardless of the law of some other state or country governing the arbitration agreement. Although the law of the forum controls in this matter, there remains the problem of the conditions under which the power should be deemed to exist and the time when it should be exercised.²¹² The first requisite would seem to be personal jurisdiction over the recalcitrant party in order that he may have an opportunity to be heard in regard to the application. Mere service on such party in the state should not be deemed sufficient, however, if the arbitration has no other connection with the state. But if the arbitration agreement provides for arbitration in the state the courts of that state should be deemed to have jurisdiction in the matter. This would seem to be true also when no place of arbitration is specified and the arbitration may be properly had at the forum. The arbitration statutes should express themselves in the sense indicated.

Before the appointment of arbitrators the party living in a state which does not have a modern arbitration act can defeat the agreement to arbitrate by the simple means of remaining in his jurisdiction.²¹³ He can have it enforced against the other party, a resident of a state having a modern arbitration act, by going there and asking for an order to compel, but it cannot be enforced against him in his own state. A way out of this difficulty can be found through legislation when there is no

210. See pp. 468 *et seq.*, *supra*.

211. See *Kirchner v. Gruban*, *supra* note 125.

212. See *Matter of Marchant v. Mead-Morrison Manufacturing Co.*, *supra* note 85.

213. (1930) 43 HARV. L. REV. 824.

necessity to appeal to the courts for the appointment of an arbitrator, for under such circumstances *ex parte* arbitrations may be authorized by statute. Fairness to the non-resident requires, in the opinion of Phillips,²¹⁴ that *ex parte* arbitrations should be allowed only (1) if the submission agreement provides for arbitration in the state; or (2) if the law of the state governs the contract either as the place of contracting or the place of performance; or (3) both parties live in the state.

Where the arbitration agreement between *A* and *B* provides for arbitration according to the law of state *X* and suit is brought in state *Y* contrary to the agreement, an issue may arise as to whether the courts of state *X* will enjoin the plaintiff from continuing the suit if *A* can be served in state *X*. The Court of Appeal of England²¹⁵ granted an injunction under similar circumstances. If the injunction were granted in state *X* the courts of state *Y* would probably feel free to disregard it.²¹⁶

A final problem may be alluded to briefly. In England²¹⁷ and in this country²¹⁸ the courts have refused to recognize the power of individuals to "oust the courts of their jurisdiction." Agreements that some court other than those of the forum shall have exclusive jurisdiction to determine disputes between the parties have been regarded as contrary to public policy and therefore invalid. The possibility of recourse to the courts is held to be for the protection of the individual and therefore cannot be set aside by contract. A similar view has been entertained also in Italy.²¹⁹ At the present time there naturally arises the question of the effect, if any, of the adoption of the modern arbitration statutes upon the validity of such contracts. It is curious that Article 69 of the Italian Code of Civil Procedure, which prohibits contracts diminishing the jurisdiction of the Italian courts, has been used in Italy for the purpose of defeating agreements for arbitration, whereas in England similar agreements are regarded as valid submission agreements, falling within the protection of the Arbitration Act of 1887. Any action brought in England contrary to an agreement that the dispute shall be decided by a foreign court will therefore be stayed.²²⁰ What the attitude of our courts will be in this regard

214. *Supra* note 97, at 222-224. See also *Finsilver, Still & Moss v. Goldberg M. & Co.*, 253 N. Y. 382, 171 N. E. 579 (1930).

215. *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.*, *supra* note 127.

216. *Foster, Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217, 1245.

217. *DICEY, op. cit. supra* note 115.

218. See Note (1929) 59 A. L. R. 1445.

219. See p. 436, *supra*.

220. See p. 481, *supra*.

is as yet uncertain.²²¹ One fact, however, is significant. The arbitration agreements that have come before the English courts have generally provided for arbitration in England, the cases in which the arbitration is to take place abroad being relatively rare. In Italy, on the other hand, many of the cases coming before the courts have called for arbitration in a foreign country, notably in England. This may explain in part why the English courts have taken a liberal view, and the Italian courts a rather narrow one, with respect to this matter.

The settlement of commercial disputes by arbitration is the established mode in England, and has proved to be a most satisfactory method. Its high repute is due to a long experience with arbitrations and to the close cooperation between the courts, the legislature and the commercial bodies. In this country, commercial arbitration is still in its earliest stages. Its utility is not as yet fully recognized throughout the country even in commercial circles. Legislation authorizing the settlement of future disputes by arbitration exists only in some twelve states. Our courts give the statutes a technical construction and adhere to their traditional view that arbitration statutes relate to procedure. The *lex fori* therefore plays a dominant rôle in the law of arbitration from the standpoint of the conflict of laws, thereby impeding most seriously the development of arbitration in its interstate and international aspects. Unless arbitration can be relieved in this country of technicality and conflicting legal rules it can never be fully successful, and yet the difficulties to be surmounted are great. The best solution, as between the different states of this country, would no doubt be the adoption of a uniform and adequate arbitration law, and as between this country and foreign countries, adherence to the Geneva Protocol on Arbitration Clauses in a revised and improved form. Such solution, however, lies only in the distant future. In the meanwhile the responsibility of producing a more satisfactory system of commercial arbitration rests with the courts and the legislatures. In the light of our experience with arbitration under the State Draft Arbitration Act since its first enactment in 1920, it seems necessary that certain amendments to the Act be adopted. Some of these have reference to the general machinery of arbitration.²²² Others have more directly to do with commercial arbitration in its interstate and international aspects. In this regard the most important change that

221. See p. 478.

222. These have been dealt with fully by Phillips, *supra* notes 50, 97; *Rules of Law on Laissez-Faire in Commercial Arbitration* (1934) 47 HARV. L. REV. 590. See also Isaacs, *Two Views of Commercial Arbitration* (1927) 40 HARV. L. REV. 929.

should be made is the insertion of a specific provision in the Act that from the standpoint of the conflict of laws arbitration agreements affect the substantive rights of the parties. The Act should contain also certain guide posts for the courts with respect to arbitration agreements made without the state or providing for arbitration without the state, including reference to the validity and irrevocability of such agreements, the conduct of the proceedings, and the power of the courts in the appointment of arbitrators and in otherwise lending their assistance to the arbitration. When the proper relationship between the courts and arbitral proceedings has been established, there is no reason why arbitration in this country should not become as effective a means in the settlement of commercial disputes as it is in England.

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20. FOREIGN AWARDS*

IN AN earlier article an attempt was made to present the problems created by commercial arbitration in its international and interstate aspects, so far as they related to the validity and enforcement of the submission agreement.¹ To complete the survey it will be necessary to consider the award and its enforcement in other countries. As between many continental countries the enforcement of foreign awards is today governed by the Geneva Convention of 1927, or by bilateral treaties containing more favorable conditions for the enforcement of awards.² The Geneva Convention is substantially in force also in England, but not in the United States and Latin-America. With respect to these non-contracting countries, the former state of the law is still in force. A general presentation of the subject will require, therefore, a discussion of foreign awards apart from the Geneva Convention, and under the provisions of the Convention. No attempt will be made to deal with the bilateral treaties that have been entered into, and the discussion will be limited to a few European and Latin-American countries whose law is of special interest. Before proceeding to the consideration of foreign awards a few words will be necessary with respect to the validity and enforcement of local awards.³

I

VALIDITY AND ENFORCEMENT OF LOCAL AWARDS

In the United States common law awards need not be made, in the absence of special stipulations to the contrary, within

* (1935) 45 YALE LAW JOURNAL 39.

1. Lorenzen, *Commercial Arbitration—International and Interstate Aspects* (1934) 43 YALE L. J. 716.

2. For example, German-Swiss Treaty of November 2, 1929, RGBI, 1930 II, 1065.

3. Attention may be called to the following abbreviations: CLUNET: JOURNAL DE DROIT INTERNATIONAL PRIVÉ; NUSSBAUM: INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESSEN IN ZIVIL-UND HANDELSACHEN, vols. 1-3 (1926, 1928, 1931). The first volume has been translated into English and the references in that volume are to this translation. (Oxford Univ. Press, N. Y. 1928). RABEL: ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT; REVUE: REVUE DE DROIT INTERNATIONAL PRIVÉ. (Since 1933 REVUE CRITIQUE DE DROIT INTERNATIONAL).

any particular time.⁴ They may be oral;⁵ and they are final and irrevocable, without the necessity of notice to the parties, as soon as the requisite number of arbitrators are in agreement.⁶ Statutory awards must generally be made within a specified time. They must be in writing, signed by the arbitrators or a majority thereof, and frequently, acknowledged as a deed. A copy of the award must, in many states, be delivered to the parties.⁷ In England, awards may be by parol if the arbitration is not within the provisions of the Arbitration Act.⁸ Awards under the Arbitration Act must be in writing and, in the absence of agreement to the contrary, must be signed by all arbitrators.⁹ Publication of the award by notice to the parties is not indispensable. However, the six months' period within which an award may be set aside begins to run only from the time of the publication of the award to the parties.¹⁰ On the continent and in Latin-America, the award must invariably be in writing. Generally it is sufficient that it be rendered by a majority of the arbitrators.¹¹ Sometimes the requirement exists that the award must contain the reasons for such award.¹² Frequently a deposit of the award with a specified court is required.¹³ In Italy it must be confirmed by a judge within five days after the filing of the award with the court.¹⁴

Common law awards can be enforced in the United States only by action, either upon the award, or, if a penal bond or promissory note or other express promise to perform the award has been given, upon such bond, note or contract.¹⁵ For the enforcement of statutory awards most states provide some summary method. In some states the mere filing of the papers in the proceedings and of the award, upon failure of the opposing

4. STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 520.

5. *Id.* at 526.

6. *Id.* at 540.

7. *Id.* at 625-671.

8. RUSSELL, ARBITRATION AND AWARD (12th ed., V. R. Aronson, 1931) 452.

9. *Id.* at 431.

10. *Id.* at 455.

11. AUSTRIA, CODE CIV. PROC. § 590; CANTON OF BERNE, CODE CIV. PROC. § 388; GERMANY, CODE CIV. PROC. § 1038; ITALY, CODE CIV. PROC. art. 21; POLAND, CODE CIV. PROC. arts. 504, 506; SWEDEN, LAW CONCERNING ARBITRAL PROCEDURE OF JUNE 14, 1929, 3 NUSSBAUM 269, § 16; CANTON OF ZURICH, CODE CIV. PROC. § 385; FRANCE, CODE CIV. PROC. art. 1016.

12. HOLLAND, CODE CIV. PROC. art. 637; HUNGARY, CODE CIV. PROC. § 782; ITALY, CODE CIV. PROC. art. 21; POLAND, CODE CIV. PROC. art. 505.

13. GERMANY, CODE CIV. PROC. § 1039; HOLLAND, CODE CIV. PROC. art. 639; HUNGARY, CODE CIV. PROC. art. 782; ITALY, CODE CIV. PROC. art. 24; NORWAY, CODE CIV. PROC. § 465; POLAND, CODE CIV. PROC. art. 507, § 2.

14. CODE CIV. PROC. art. 24.

15. STURGES, *op. cit. supra* note 4, at 676.

party to perform within the time provided, is sufficient to give the award the force and effect of a judgment at law.¹⁶ The method provided by the New York statute¹⁷ and others is by way of application or motion to the court to confirm the award. The summary statutory method of enforcement is available in some states only if the agreement stipulates that the award be entered as a judgment in a designated court.¹⁸ The validity of the judgment on the award presupposes that the court had jurisdiction over the losing party. In a majority of states, where the award was not confirmed and entered as a judgment of court pursuant to the arbitration statute, valid statutory awards have been held enforceable by non-statutory or common law methods as well.¹⁹ Where, however, such judgment has been entered the award may be regarded as "merged" in the judgment.²⁰ Judgments upon common law awards are subject to the ordinary rules relating to appeals and writs of error which prevail in the different states. As regards statutory awards, there is a great deal of variance in the legislative provisions or uncertainty regarding the question whether an appeal or writ of error may be taken from a judgment entered on the award or from an order vacating the judgment.²¹

In England, the Arbitration Act of 1889²² provides that an award on a submission may be enforced by leave of the court

16. See ALA. CODE ANN. (Michie, 1928) § 6161; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4297; TEX. ANN. CIV. STAT. (1928) art. 231.

17. N. Y. CIV. PRAC. ACT (1929) § 1456. Under the New York statute the court must grant the order confirming the award unless the award has been vacated, modified, or corrected. The judgment so rendered by the court is docketed as if rendered in an action and has the same force and effect and is subject to all provisions relating to a judgment in an action, and it may be enforced as if it had been so rendered. See STURGES, *op. cit. supra* note 4, at 708 et seq.

18. For example, Indiana (see STURGES, *op. cit. supra* note 4, at 279), Iowa (Id. at 282), Idaho and Montana (Id. at 275).

19. STURGES, *op. cit. supra* note 4, at 9. *Contra*: Older v. Quinn, 89 Iowa 445, 56 N. W. 660 (1893).

20. STURGES, *op. cit. supra* note 4, at 11.

21. Id. at 881 et seq.

22. Section 12. The method provided is a prompt and convenient one, as no objections to the award are sustainable. Application for leave to enforce the award is made by originating summons before a Master in Chambers. Section 12 does not, however, give to the court the power of directing that judgment be entered in the terms of the award; it merely places the award on a footing similar to that of a judgment, so far as enforcement is concerned. "It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, viz., an award." In re a Bankruptcy Notice, [1907] 1 K. B. 478, 482. And a party who has obtained leave to enforce an award is not precluded from bringing an action upon the award. See China Steam Navigation Co. v. Van Laun, 22 T. L. R. 26 (K. B. 1905).

or a judge, in the same manner as a judgment or order to the same effect. This method displaced the less summary method by way of rule of court provided for in the Common Law Procedure Act of 1854. The order for leave to enforce the award is based upon an originating summons which formerly had to be served personally. An amendment of the Rules of the Supreme Court (of 1920) now expressly permits the Court or a judge to allow service out of its jurisdiction.²³ An appeal will lie from the decision of the Master in Chambers, to whom the application for the enforcement of the award must be made in the first instance, to a Judge in Chambers and from the Judge in Chambers to the Court of Appeal.²⁴ An appeal lies likewise to the Court of Appeal from a judgment of a Divisional Court setting aside an award.²⁵

In some continental countries action must be brought upon the award. In others a more summary procedure exists. In France, an award is rendered executory by a decree of the President of the Tribunal in a simplified proceeding in which the parties are not heard.²⁶ In Germany, prior to the Code of Civil Procedure of 1877, awards could be enforced in some states only by an action to obtain a judgment on the award (*Erfüllungsklage*). In others, they were enforceable on the same basis as foreign judgments.²⁷ According to Section 1040 of the Code of Civil Procedure the award has, as between the parties, the same effect as a final judgment. Therefore, an action on the award, or on the underlying contract, does not lie. Enforcement in a more simplified manner has been provided by means of an action for enforcement. (*Vollstreckungsklage*).²⁸ Since 1930 this enforcement proceeding has been further improved by the introduction of a summary method for enforcement.²⁹

Much controversy exists in the various countries on the point whether a decree in a summary proceeding rendering the award enforceable by execution, operates to convert the award into a judgment.³⁰ This question may become of practical im-

23. RUSSELL, *op. cit. supra* note 8, at 275.

24. *Id.* at 276.

25. *Id.* at 266.

26. CODE CIV. PROC. art. 1020.

27. I WACH, HANDBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS (1885) 65 et seq.

28. CODE OF CIVIL PROCEDURE, § 1042.

29. *Id.* at § 1042 a-d.

30. See BRACHET, DE L'EXÉCUTION INTERNATIONALE DES SENTENCES ARBITRALES (1928) 86 et seq.

The Appellate Court of Douai has held that such exequatur would not convert the award into a judgment. *Adair & Co. v. Leroy-Crépeaux*, 29 Clunet 1023.

portance in a suit for the enforcement of the award in another state or country.

The grounds for the impeachment of awards in the United States vary in detail, but in general they have reference to the existence or non-existence of a binding contract of arbitration, to the improper constitution of the arbitral tribunal, or to the arbitral proceedings themselves, for example, to the question whether the defeated party had notice of the proceedings and an opportunity to be heard, whether the arbitrators exceeded their authority or refused to hear pertinent testimony, or whether they were guilty of partiality, fraud, corruption, or other misconduct. There is no review of the merits, and in the absence of fraud or misconduct an award cannot be impeached for error of judgment, whether of law or fact.³¹ Similar grounds for impeachment exist in England. Misconduct of an arbitrator is a ground for setting aside the award, but is not a defense in an action upon the award.³² In addition, under the inherent powers possessed by the Court, an award will be set aside which is bad on its face, irrespective of whether the error is one of fact or of law.³³

The mode of impeaching awards varies a great deal on the continent and in Latin-America. Some countries, following the French example, allow the ordinary remedy of appeal (appellation), provided the parties have not waived such right.³⁴

Nussbaum suggests that the question should not turn upon considerations of an internal or procedural nature, for example, upon whether the exequatur is granted by a full court or by a single judge, nor upon whether it is given in a summary or ordinary proceeding, nor upon whether the decision rendered is called a judgment or not, but upon whether or not the defendant had an opportunity to be heard. If, as in France and Belgium, he is not heard, the granting of the exequatur should not be regarded as converting the decree into a judgment. But in those countries in which the exequatur proceeding is one of contentious jurisdiction in which the defendant is afforded an opportunity to present his objections, the enforcement order is a regular judgment. 1 NUSSBAUM 26.

31. STURGES, *op. cit. supra* note 4, at 787 et seq. See *C. Itoh & Co., Ltd. v. Boyer Oil Co., Inc.*, 198 App. Div. 881, 191 N. Y. Supp. 290 (1st Dep't, 1921); *Matter of Goff & Sons, Inc., and Rheinauer*, 199 App. Div. 617, 192 N. Y. Supp. 92 (1st Dep't, 1922); *Matter of Pine St. Realty Co., Inc. v. Coutroulos*, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't, 1931).

An appeal from an order or judgment on the award, founded on a matter of law apparent upon the record, is allowed in Massachusetts. MASS. GEN. LAWS (1921) c. 251, § 12.

32. RUSSELL, *op. cit. supra* note 8, at 280.

33. *Id.* at 201, 218; see *Buerger & Co. v. Barnett*, 89 L. J. K. B. (N. S.) 161 (H. L. 1919).

34. FRANCE, CODE CIV. PROC. arts. 1010, 1023. There is some doubt in France whether the party can waive the right. André-Prudhomme, *The Present Position of the Arbitration Clause under the Law of France*, 1 NUSSBAUM 70, 75.

Others deny the right of appeal or allow it only where the parties provided for such right in the arbitration agreement.³⁵ Distinctions exist also between the cases in which the arbitrators were authorized to act as amicable compounders and those in which they were bound by rules of law. The countries denying the ordinary remedy of appeal generally provide for extraordinary remedies, by means of which the award can be vacated or declared invalid.³⁶ The grounds upon which awards may be impeached also vary a great deal in the different countries. Controversy exists likewise regarding the question whether an appeal or an application to have the award set aside suspends the enforcement of the award. The time limit within which the proceeding for impeachment must be brought is frequently that provided for appeals from judgments. Sometimes the period is fixed in the arbitration statute itself.³⁷

II

ENFORCEMENT OF FOREIGN AWARDS APART FROM THE GENEVA CONVENTION

A. Enforcement in Foreign Countries of Awards Rendered Elsewhere

*Modes of Enforcement in General.*³⁸ In many countries, in which the award is regarded as in the nature of a contract, and the action, for the performance of such contract, foreign awards may be enforced by an action to obtain a judgment on the award. An action to obtain a judgment on the award may be allowed notwithstanding the fact that an order rendering it executory has been obtained in the state of rendition. But if the award in the foreign country has been converted into a judgment, instead of having been merely rendered executory, suit must be brought as for the enforcement of a foreign judgment. On the continent, a foreign judgment is not enforced by an action on the judgment as a new cause of action, but by an execution-procedure to declare it executory (to provide it with

35. For example, Germany, see 2 GAUPP-STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG (15th ed. 1934) § 1040(1).

36. CODE OF CIVIL PROCEDURE § 1041.

37. For example in Sweden, where the period is sixty days reckoned from the time of the service of the award. Law concerning Arbitral Procedure of June 14, 1929, 3 NUSSBAUM 272 § 21.

38. "Many aspects of the definition of a 'foreign arbitration agreement and award' are obscure." 1 NUSSBAUM 17. For a discussion of the problem see Jonas, *Anerkennung und Vollstreckung ausländischer Schiedssprüche* (1927) JW 1297 et seq.; Kahn, reviewing "Schiedsrecht" by Dr. Franz Prager, 6 RABEL 288-289; BRACHET, op. cit. *supra* note 30, at 9 et seq.

an exequatur). In some countries the only mode of enforcing foreign awards is by having them declared executory in the home state, and then enforcing them as foreign judgments.³⁹ Such judgments are sometimes enforceable only if reciprocity exists, and in Austria and Hungary only if reciprocity is established by treaty or governmental decree.⁴⁰ It is generally held in these countries that no reciprocity exists with respect to the United States. Austria will not enforce oral awards of foreign countries even if the necessary reciprocity exists.⁴¹

In certain countries foreign awards are enforceable by the simplified procedure provided for the enforcement of domestic awards. This is the case in Belgium, where the award must be presented to the President of the Tribunal for the district in which execution is sought, or of the district in which either party is domiciled.⁴² The order for enforcement (exequatur) will be granted without hearing the losing party, if the award is formally correct and not contrary to mandatory provisions of the Belgian law or to its public policy. Although the provisions of the Belgian Code of Civil Procedure relating to arbitration are identical with those of France, there is considerable controversy in the latter country as to whether foreign awards can be enforced by the simplified procedure. Courts and authors have vacillated a great deal in this matter.⁴³ The hesitancy of certain French courts to apply the simplified procedure to foreign awards is based, at least in part, upon considerations of

39. For example, in Austria, where an action to obtain a judgment on the foreign award will not lie. OGH, April 28, 1931, 4 NUSSBAUM 117.

40. OGH, March 8, 1904, 1 NUSSBAUM 350; Dec. 16, 1908, 1 NUSSBAUM 353; Dec. 14, 1909, 6 REVUE 930; May 4, 1909, 41 CLUNET 982; Wehli, *Arbitral Tribunals under Austrian Law*, 1 NUSSBAUM 114, 123 et seq.; Fabinyi, *Schiedsgerichte nach Ungarischem Recht*, 3 NUSSBAUM 35, 49.

41. OGH, March 8, 1904, 1 NUSSBAUM 350.

42. Cass., Oct. 15, 1913, Pas. 1914, 1, 32; Sté Match Ltd. v. Adriaens, App. Ghent, May 5, 1927, 55 CLUNET 1245; Fritz & Co. v. Zaretski, App. Brussels, March 28, 1928, 41 CLUNET 246, 3 NUSSBAUM 362; App. Liège, Nov. 7, 1896, 26 CLUNET 1041; Lloyd Royal Belge v. Société Corry Bros., Trib. Civ. d'Anvers, May 11, 1923, 62 Jurisp. du Port d'Anvers 446.

43. In favor of simplified procedure before the President of the Tribunal, see Liquidation Max Jacques & Co., App. Douai, Dec. 10, 1901, Dalloz 1903, II, 129; Adair & Co. v. Leroy Crépeaux, App. Douai, May 30, 1902, 29 CLUNET 1023; Briens v. Zuckerhandelsunion Aktiengesellschaft, App. Lyon, Nov. 25, 1913, 41 CLUNET 1230; Desfossez & Dervaux v. John Bursall & Co., App. Douai, May 27, 1911, 8 REVUE 717. In favor of exequatur by the full court, see Marquis de Santa Cristina v. Prince and Princess del Drago, App. Paris, Dec. 10, 1901, Dalloz 1905, II, 128; Salles v. Hale & Co., App. Aix, Dec. 18, 1913, Cass. (Req.) Dec. 8, 1914, 43 CLUNET 1218; Landauer v. Betaille & Co., Trib. des Bouches du Rhône, March 18, 1927, Dalloz Hebd. 1927, 845; Hashimoto v. Galusset & Co., Trib. Civ. Seine, Feb. 10, 1922, 49 CLUNET 150; Campbell & Co. v. Bloch, Trib. Civ. Seine, Nov. 16, 1922, 50 CLUNET 78.

fairness to the party against whom the suit for enforcement is brought. As the exequatur is granted in such a proceeding without hearing the losing party, the latter, if a non-resident, might not learn of the proceedings in time to protect his rights. They conclude, therefore, that the application for the order of enforcement should be heard by the full court, as in the case of an ordinary proceeding for the enforcement of foreign judgments, which requires notice to the defendant.

Whether a foreign award could be rendered executory in Germany by means of the simplified procedure laid down in Section 1042 of the Code of Civil Procedure for domestic awards was subject to dispute.⁴⁴ According to the prevailing opinion a foreign award could be enforced until 1930 only by means of an action on the award. This controversy was settled in 1930, by an amendment to the Code, which specifically states that the simplified procedure is applicable to foreign awards.⁴⁵

Requisites for Enforcement in General. In order to be entitled to enforcement the submission agreement must be valid according to the proper law, as determined by the rules of the Conflict of Laws of the state of enforcement. The award must have been validly rendered by an arbitral tribunal constituted in accordance with the terms of the submission agreement and the law governing the arbitration proceedings, as determined by the rules of the Conflict of Laws of the state of enforcement. The enforcement of the award must not contravene the public policy of the forum. Foreign awards will not be enforced until they are "definitive," but there is no agreement in continental countries regarding the meaning of the term.

The merits of the award will not be re-examined in any proceeding to enforce a foreign award either as to the facts or the law,⁴⁶ and without regard to the nature of the proceeding—

44. In favor of such simplified procedure, see KG, March 30, 1928, JW 1928, 1871. *Contra*: OLG Hamburg, Dec. 21, 1929, JW 1930, 768, NUSSBAUM 338; OLG Karlsruhe, March 13, 1929, Badische Rechtspraxis 1929, 43, 3 NUSSBAUM 350; LG Bremen, June 19, 1930, 3 NUSSBAUM 348.

45. CODE OF CIVIL PROCEDURE § 1044. Since 1930 an action to obtain a judgment on the award has been permissible only in the exceptional case where the award does not determine the ultimate liability of the parties. OLG Hamburg, Jan. 15, 1932; Hans. RG 1932, 238.

46. For example, in France, notwithstanding the fact that foreign judgments are reexamined on their merits, *Bernard & Lowagie v. The General Mercantile Co.*, Cass. (Req.) June 21, 1904, 31 CLUNET 888; *Société des Fils Crémades v. Lindsay*, Cass. (Req.) July 9, 1928, Dalloz 1928, I, 173, Sirey 1930, I, 17, and note by Niboyet; *Aff. Salles v. Hale & Co.*, App. Aix, Dec. 18, 1913, Cass. (Req.) Dec. 8, 1914, 43 CLUNET 1218. So also in Germany: *M. G. Société Anonyme v. G. & Sohn, G.m.b.H.*, RG Jan. 28, 1927, 116 RG 76, 2 NUSSBAUM 301; RG, Feb. 7, 1928, 3 NUSSBAUM 324; RG Feb. 2, 1928, 3 RABEL, SONDERHEFT 173.

whether it is an action on the foreign award or a proceeding to render the foreign award executory by the simplified procedure, or by means of a regular action, as in the case of a foreign judgment. The merits of a foreign award have been re-examined, however, to the extent that they were subject to re-examination in the country where the award was rendered.⁴⁷ In Italy the merits of an arbitral award will be re-examined whenever it is rendered by default;⁴⁸ also if the award was procured fraudulently by the plaintiff,⁴⁹ or if the award was based on forged or altered documents, the forgery or alteration having been discovered by the defendant only after the rendering of the award,⁵⁰ and under certain other circumstances.⁵¹

Enforcement in Specific Continental Countries. Belgium and France. There are no Code provisions relating to the enforcement of foreign awards. As has been shown above,⁵² much difficulty has been experienced in these countries, especially in France, concerning the manner of their enforcement. Whenever the proceeding is before a single Judge of the Tribunal, in which the defendant is not heard, the order permitting enforcement may be reviewed by the full court.

Before an exequatur is granted by a French court the President of the Tribunal will consider the following points:⁵³ (1) The validity of the arbitration agreement;⁵⁴ (2) the jurisdiction of the Arbitral Court; (3) the regularity of the arbitral proceedings, especially whether the losing party was duly cited and given an opportunity to be heard⁵⁵ (4) whether the en-

47. Cohn v. Kolonial-Produkten-Einfuhr A.G., OLG Hamburg, Oct. 31, 1924, Hans. Rechtszeitschrift, 1925, 63, 1 NUSSBAUM 302.

48. Thornett & Fehr v. Società Unione Commissionaria Ligure, Cass. Feb. 16, 1929, Foro It. 1929, I, 1, 617.

49. CODE CIV. PROC. art. 941, § 2, art. 494, no. 1.

50. CODE CIV. PROC. art. 941, § 2, art. 494, no. 2.

51. Namely, if the defendant regains possession of a vital document which he could not produce in the arbitration proceedings owing to plaintiff's conduct, or if the award resulted from a mistake of fact based upon documents and records in the case, provided the award was based upon the assumption of a fact which is erroneous beyond a doubt, or upon the assumption of the absence of a fact, the existence of which has been positively established, and such fact was not in issue in the arbitration proceedings and decided in the award. CODE CIV. PROC. art. 941, § 2, art. 494, nos. 3-4.

52. *Supra*, p. 512.

53. BRACHET, op. cit. *supra* note 30, at 128-129.

54. Hashimoto v. Galusset & Co., Trib. Civ. Seine, Feb. 10, 1922, 49 CLUNET 150; Campbell & Co. v. Bloch, Trib. Civ. Seine, Nov. 16, 1922, 50 CLUNET 78.

55. Hashimoto v. Galusset & Co., Trib. Civ. Seine, Feb. 10, 1922, 49 CLUNET 150; Campbell & Co. v. Bloch, Trib. Civ. Seine, Nov. 16, 1922, 50 CLUNET 78; Aff. Salles v. Hale & Co., App. Aix, Dec. 18, 1913, Cass. (Req.) Dec. 8, 1914, 43 CLUNET 1218.

forcement of the award would violate French public policy.⁵⁶

No order for enforcement need have been obtained in the state in which the award was rendered.⁵⁷

Holland. There is no simplified procedure in Holland for the enforcement of foreign awards, a summary proceeding being allowed only with respect to domestic awards. Foreign awards can be enforced only by means of an action on the award.⁵⁸ The judge will inquire whether there was a valid submission agreement and a valid award and whether its enforcement would be contrary to Dutch public policy. It is not necessary that an order for the enforcement of the award was obtained in the state in which the award was rendered.⁵⁹

Germany. The enforcement of foreign awards in Germany has been clarified by the Law of July 25, 1930.⁶⁰ According to this law the simplified procedure applicable to German arbitral awards is extended to foreign awards, unless treaties between the countries provide otherwise. The law contains an express provision that Section 1039 of the German Code of Civil Procedure, relating to the formal execution of awards, their service upon the parties and deposit with the proper German court, is not applicable to foreign awards. The foreign awards will be declared executory after the court has satisfied itself, *ex officio*, that the award is a subsisting, valid award under the foreign law and that it is final. It is not necessary that the award should have been declared executory in the foreign state. The losing party may prevent the enforcement of the award by proving any of the grounds enumerated in Section 1044 of the Code of Civil Procedure, as amended in 1930. These are:

(1) That the award is without legal effect. So far as treaties do not provide otherwise the effectiveness of the award is to be determined by the law governing the award; (2) that the

56. *Urania v. L'Eclair*, Trib. Civ. Seine, Feb. 2, 1926, 54 CLUNET 436; and cases cited *supra* note 55.

57. See *Briens v. Zuckerhandelsunion*, App. Lyon, Nov. 25, 1913, 10 REVUE 109.

58. *In re H. Wiener & Co. v. J. van den Bosch*, Hooze Raad (Supreme Court), Dec. 8, 1916, Weekblad Van Het Recht, no. 10054, 1 NUSSBAUM 343. It was held in *In re Pymon Bell & Co. v. C. H. Vernooij*, Rb. Utrecht, Feb. 16, 1910, Weekblad, no. 8993, 1 NUSSBAUM 347, that an action on an English award would lie only if such action could be brought in England.

59. *Kalker & Visser v. Browne, Drakeford & Co.*, Hof Amsterdam, Jan. 21, 1925, Weekblad, no. 11344. So, *Le Comptoir Commercial Anversoise v. J. E. Mulock Houwer Dzn.*, Rb. Zierikzee, March 17, 1903, Weekblad, no. 7935.

60. CODE OF CIV. PROC. § 1044. For a summary statement of the earlier law, see Rheinsteint, *Die Vollstreckung ausländischer Schiedssprüche in Deutschland*, 5 RABEL 555.

recognition of the award would be *contra bonos mores* or the public order, especially if the award would compel a party to perform an act, the doing of which is prohibited by German law; (3) that the party was not duly represented, unless such party has ratified the proceedings either expressly or by implication; (4) that the party was not given a proper hearing.

In the above cases a foreign award—unlike a domestic award—will not be set aside by the German courts,⁶¹ but a declaratory judgment may be rendered denying it enforceability in Germany. However, if the award is set aside in the country in which it was rendered after being declared executory in Germany, an action may be brought in Germany to vacate the enforcement order.

Sweden. The enforcement of foreign awards is regulated in Sweden today by the Law of June 14, 1929.⁶² This law provides that foreign awards shall be valid in Sweden with the reservations contained in section 7 of the Law. According to these reservations foreign awards will not be enforced (1) if the arbitral agreement is invalid according to the applicable law; (2) if the award has been set aside in the country where it was rendered; (3) if some other circumstance exists by virtue whereof the award is without effect in the foreign state; (4) if suit is pending in the foreign state concerning the validity of the award, or the time allowed for setting aside the award has not yet expired; (5) if the award deals with a matter which cannot be brought before arbitrators according to Swedish law; (6) if the party against whom the award was rendered did not have a reasonable opportunity to defend his rights; (7) if the question submitted to arbitration has been decided in Sweden subsequent to the making of the arbitral agreement by an ordinary court or by the "chief executor"; (8) if a circumstance exists with respect to the arbitral procedure or the award which would make the enforcement of the award contrary to *bonos mores*. Provisions contained in subsections 3 and 6 will not invalidate the award in Sweden unless they are set up by the party against whom the award is sought to be enforced.

Switzerland. The legal situation in regard to the enforcement of foreign awards is very complex in Switzerland, there being no uniform law of procedure in the twenty-five cantons. Under the federal constitution the cantons are under a duty to recognize and enforce judgments rendered in other cantons.⁶³ The

61. According to a decision of the German Supreme Court in 116 RG 194, German courts have no jurisdiction to set aside foreign awards.

62. See 3 NUSSEBAUM 281.

63. SWISS CONST. art. 61.

same obligation exists with respect to cantonal arbitral awards if by the law of the canton where they are rendered they are placed upon the same footing as judgments. With respect to awards of foreign countries, the cantons are bound by any federal treaty. The cantons also have the power to enter into treaties through the intermediacy of the Federal Council.⁶⁴ In the absence of federal or cantonal treaties relating to the enforcement of the awards of foreign countries, the provisions of the local codes of procedure control. As these are only very meager, or totally absent, with respect to foreign awards, there is great difficulty in ascertaining what the cantonal law is. Most of the cantons appear to assimilate foreign awards to foreign judgments and to subordinate their enforcement to the existence of reciprocity.⁶⁵ No reciprocity is required, however, in some cantons,⁶⁶ the principal one being that of Berne. Section 4 of Article 401 of the Code of Civil Procedure of Berne provides that the provisions relating to the enforcement of foreign judgments shall be applicable to foreign awards. These require that the judgment (award) be final and valid by the law of the place of rendition, that the defendant must have been duly cited, and that enforcement of the award should not contravene any public policy of the forum. For the enforcement of a foreign award in the Canton of Berne it is not necessary that an order rendering it executory should have been obtained in the home state.⁶⁷

In some cantons a distinction is made between foreign judgments and foreign awards in the matter of reciprocity, permitting the enforcement of foreign awards,⁶⁸ without the

64. SWISS CONST. arts. 9-10; BURCHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG (1905) 143.

65. See *Sumobor v. Marcel Lob*, Council of State of Wallis, July 12, 1928, 56 CLUNET 800, and note by Leresche; OG Zurich, Nov. 7, 1924, 24 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 329, 2 NUSSBAUM 358; LERESCHE, L'EXÉCUTION DES JUGEMENTS CIVILS ÉTRANGERS EN SWISSE (1927) 85-109. Compare decision by Swiss Supreme Court, March 26, 1920, 19 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 276, 2 NUSSBAUM 344.

66. See LERESCHE, *op. cit. supra* note 65, at 109-112.

67. So far as foreign awards fall within the purview of the Geneva Convention of 1927, the cantonal courts are not free to apply their own rules of the Conflict of Laws but are bound by the decisions of the Swiss Supreme Court. Accordingly, an arbitral agreement will be valid throughout Switzerland as regards "form" if the formalities of the law of the place of execution of the agreement or those of the law of the place in which the arbitration was to take place were satisfied. Supreme Court, Oct. 2, 1931, 57 Entscheidungen des Schweizerischen Bundesgerichts I, 295.

68. Super. Court of Zurich, March 19, 1926, 27 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 36, 56 CLUNET 800; CANTON BASEL-STADT, CODE CIV. PROC. (as amended, Jan. 1, 1925) § 258.

existence of reciprocity. This attitude is taken also by the federal courts.⁶⁹

Italy. The Royal Decree of July 20, 1919, modifying Art. 941, Code of Civil Procedure (confirmed by law of May 28, 1925) placed foreign awards substantially on the same footing as foreign judgments.⁷⁰ Foreign awards are enforceable, however, only if rendered between foreigners or between an Italian and a foreigner, and not when they are between two Italians.⁷¹ The conditions under which foreign awards are enforced in Italy are the following:⁷² (a) that the award must have been rendered by a competent tribunal and preceded by proper notice to, and hearing of the defendant; (b) must be irrevocable and executory, with the effect of a judgment, according to the law of the place of rendition; (c) must not be in conflict with an Italian judgment or concern a subject matter pending before an Italian court at the time enforcement is sought; (d) must not contravene Italian public policy or law; (e) can be declared executory, where the foreign award was by default and the defendant failed to appear in the Italian enforcement (*exequatur*) proceeding, only if the defendant was served personally in the enforcement proceeding.

Exequatur proceedings must be brought before the Court of Appeals of the district in which the enforcement of the award is sought. The merits of the award cannot be re-examined, with two important exceptions, first, in case the award was rendered by default, and, secondly, in case the circumstances indicated in Article 494, numbers 1-4 of the Code of Civil Procedure, occur.⁷³ From the above it is apparent that there are two ways in Italy by which the enforcement of foreign awards may be resisted; first, by not appearing, in which event the losing party may, if sued in Italy on the award, ask for a re-examination of the merits of the case;⁷⁴ second, by starting a suit in Italy with

69. Supreme Court, March 26, 1920, 19 BLÄTTER FÜR ZÜRCHERISCHE RECHTSPRECHUNG 276.

70. Art. 941, § 4.

71. Art. 941, § 4. The award is unenforceable if both parties are Italian subjects at the time of the rendition of the award, although they were not at the time the agreement for arbitration was entered into. *Cominelli c. Cappelli*, Cass. del Regno, Feb. 11, 1925, Riv. di Dir. Int. 1925, 429, and note by Perassi. An agreement between an Italian and a foreigner, entered into abroad but to be performed in Italy, which excludes the jurisdiction of the Italian courts and refers all disputes arising out of the contract to a foreign court, is void. *Ragghianti v. Nardi*, Foro It., Rep., vol. 55, no. 11 (1930).

72. Art. 941, §§ 1, 3, 4.

73. CODE CIV. PROC. art. 941, § 2. See *supra* p. 46.

74. See *Hindley v. Canapificio*, App. Trieste, Jan. 13, 1931, Giur. It. 1931, I, 2, 240.
I, 2, 240.

reference to the same matter even if he did appear in the arbitration proceedings.

Enforcement in Specific Latin-American Countries. Argentina. Foreign awards are regarded as judgments by the federal courts and enforceable as such. Exequatur proceedings are brought before the Judge of First Instance and will be granted if the provisions of Articles 558 to 562 of the Code of Civil Procedure are complied with.⁷⁵ According to these, reciprocity is not required for the enforcement of foreign awards and the merits will not be re-examined.⁷⁶ The award must be valid and enforceable in the state in which it was rendered. It will not be enforced if the claim on which it was based would be invalid according to Argentine law; nor where the award is by default and the losing party was domiciled in Argentina. The state courts are governed by their own codes of civil procedure which do not always coincide with the provisions of the federal law.

Brazil. Foreign awards are said to be unenforceable in Brazil on principle, subject, however, to important qualifications. Article 13 of the Imperial Decree 6982 of July 27, 1878 provided that foreign awards, confirmed by a judgment of the foreign court, were to be enforceable in Brazil after an examination by the Supreme Court. Since the establishment of the Republic, Law 221, of November 20, 1894, introduced exequatur proceedings, with respect to foreign judgments, according to which foreign judgments could be enforced in Brazil without reference to reciprocity after being homologated by the Supreme Court. The above provisions are deemed applicable to foreign awards confirmed by a judgment in the home state. No reciprocity is required and no re-examination is made of the merits.⁷⁷ The court is to inquire whether (1) the award was valid and final, (2) the arbitral court had jurisdiction, (3) the defendant had notice and an opportunity to be heard, (4) the enforcement of the award would be contrary to the public policy or to the public law of Brazil.⁷⁸

Chile. Just as in the case of foreign judgments, foreign awards will be enforced if there is a treaty to that effect, or if reciprocal treatment is given by the foreign country to Chilean awards.⁷⁹ The Chilean Code of Civil Procedure contains the following

75. With respect to awards of Bolivia, Paraguay, Peru, and Uruguay, the provisions of the Treaty of Montevideo (arts. 5 et seq.) control.

76. Aff. Guilhermina Simões, Supreme Court, June 20, 1906, 34 CLUNET 483.

77. Valladão, *Die Schiedsgerichtsbarkeit in Zivil- und Handelssachen in Brasilien*, 3 NUSSBAUM 57.

78. Id. at 61-62.

79. CODE CIV. PROC. arts. 239-241, 243.

additional provisions,⁸⁰ the relation of which to the previously mentioned Code provisions appears doubtful. According to these, foreign judgments to which none of the foregoing provisions can be applied will have the same effect as Chilean judgments, provided: (1) They contain nothing contrary to the laws of Chile, excepting procedural laws; (2) they are not opposed to the Chilean jurisdiction, (3) the judgment is not by default; (4) they have been rendered executory according to the law of the country in which they were rendered.

Uruguay. In Uruguay likewise, foreign awards are enforced on the same terms as foreign judgments. In the absence of treaty provisions⁸¹ the courts of Uruguay are guided in the enforcement of foreign judgments by the principle of reciprocity.⁸² The Code of Civil Procedure of Uruguay contains the following additional provisions, the interpretation of which gives rise to the same doubts as the corresponding provisions of the Chilean Code of Civil Procedure.⁸³ If the foreign judgment does not fall within the foregoing provisions it will have executory force in Uruguay, if it is presented in "authentic" form and it is apparent that it satisfies the following requirements:⁸⁴ (1) that it was rendered by competent judicial authority; (2) that the defendant was duly cited and represented at the trial, or legally declared in default, notice of the judgment having been given to him even in this case; (3) that it is not opposed to the public order, good morals, to the Constitution and laws of Uruguay.⁸⁵

Enforcement of foreign awards in England. Whether a foreign award, not governed by the Arbitration (Foreign Awards) Act, 1930,⁸⁶ be regarded as a judgment or a contract in England, the ordinary, if not exclusive, remedy for its enforcement will be in either case the ordinary action as upon a contract claim.⁸⁷ From a procedural point of view an action upon a

80. Art. 242. Quaere: (1) Can Art. 242 be harmonized with the foregoing articles, especially with Art. 241? (2) Does it refer to judgments of countries with respect to which no reciprocity has been *proved*? (3) Does Art. 242 lay down qualifications to the general requirements contained in Arts. 239-241?

81. As between Uruguay and Argentina, Bolivia, Paraguay and Peru, the provisions of the Treaty of Montevideo (Arts. 5 et seq.) control.

82. Art. 513.

83. See *supra* note 80.

84. Art. 514.

85. Art. 515.

86. This Act reproduces in substance the provisions of the Geneva Convention of 1927 for the Enforcement of Foreign Awards. By the terms of this Convention, England, which is one of the ratifying states, is under a duty to enforce awards rendered in any of the Contracting States by the same procedure with which it enforces its own awards.

87. Section 12 of the English Arbitration Act provides for a summary procedure, the award being made enforceable by leave of the court or a

judgment would present no substantial advantages over an action upon an award. On the other hand, since there is no reciprocity doctrine in England in the matter of enforcing foreign judgments, a judgment on the award would not render the award more difficult of enforcement than it would have been had no judgment been rendered thereon. However, the judgment and contract concepts have obtained peculiar significance in England from another point of view. In the case of *Merrifield Ziegler & Co. v. Liverpool Cotton Association*⁸⁸ suit was brought to have an award, rendered in Germany, declared invalid and void. There was a counterclaim that the award be declared binding and that payment be ordered as specified in the award. The court found that plaintiff had failed to establish that the award was void and invalid. Although the award was admitted to be valid and binding, the court refused, however, to order execution of it because no order to enforce had been issued upon the award in Germany. In answer to the argument that enforcement might be granted on the basis of an implied contract to abide by the award, Eve, J. declared :

"The obtaining of an enforcement order is the only method known in practice for enforcing an award made in Germany, and there seems some ground for the proposition that it is the only legal method. But in Germany an action can be brought to enforce an award made in another country, and the German court, if satisfied

judge in the same manner as a judgment or order to the same effect. The summons must be personally served upon defendant. Service out of the jurisdiction of any summons to remit, set aside or enforce an award is possible, since 1920, if the award is rendered in an English arbitration (Order XI, r. 8a (c) of the Supreme Court; RUSSELL, *op. cit. supra* note 8, at 275). The remedy under Section 12 is available, however, only when the award has definitely settled the rights and liabilities of the parties; nor will the court make an order if there is any doubt as to whether the award is valid or binding. RUSSELL, *op. cit. supra* note 8, at 272-273; 1 HALSBURY'S LAWS OF ENGLAND (1931) 461.

Enforcement by action is the appropriate remedy where a submission is by parol or where an award is not final or where the validity of an award is doubtful, and this action is available as of right to enforce any local award, even if Section 12 is applicable or has already been applied. This action is simply an action on the contract. Although it has been suggested (see Report of Committee on the Law of Arbitration, of March 1, 1927, RUSSELL, *op. cit. supra* note 8, at 644) that Section 12 of the Arbitration Act may be applicable to the enforcement of foreign awards not falling within the Geneva Convention, it may well be held that it has reference only to awards rendered in England. Even if applicable on principle to foreign awards this summary procedure may not be available for the reason that such awards will probably be unable to meet the requirements of clarity and certainty necessary for the application of the summary method.

88. 105 L. T. 97 (Ct. App. Ch. Div. 1911).

that the award is valid according to the law of the country where it was made and is not in conflict with German law, will enforce it. The defendants' experts express the opinion that the ground upon which the German court enforces the foreign award is that the court implies in the submission a contract to be bound by and to carry out the award, and they found upon this the further opinion that the same implication arises in the case also of a German submission and a German award; but no authority is cited in support of this opinion, nor is it to be found advanced in any German commentary or textbook, and its soundness is emphatically disputed by the plaintiffs' experts. In this condition of the evidence, while not taking upon myself to determine whether or not the doctrine of implied contract is imported into a German submission, I am bound to hold that the defendants have not affirmatively proved that it is."

The Judge then takes up the question of enforceability of the award as a foreign judgment and finds the award,

"of no force or effect unless and until the court determines that it is an adjudication made in proceedings regularly conducted upon matters clearly submitted to the jurisdiction of the tribunal. . . . This stage has not yet been reached with the award under consideration, and, were I to give judgment upon it here, I should be giving the defendants power to issue execution in this country on an award in respect of which no execution could be levied in the country where it was made."

According to the *Merrifield* case, a foreign award may be enforced by action either upon the award as a contract, or upon the judgment on the award, provided, however, the award is so enforceable in the country where it was rendered. In order for the award to be enforceable in England as a *judgment*, it must have been rendered executory beforehand in the country where it was rendered. Likewise, in order to enforce the award by an action as upon a contract, it must be proved that such action would be allowed in the country where the award was rendered. The question, however, is whether the *Merrifield* case can be justified.⁸⁹ So far as the German law is concerned, the contractual character of an arbitral award is recognized, and, traditionally, an action on the award has been the appropriate remedy. This remedy is no longer necessary, however, in view of the fact that a simpler and less expensive method for the enforcement of awards has been substituted in modern law. From an English point of view the question whether at the time of the *Merrifield* case an action on the

89. See the criticisms of KAHN, JOURNAL OF COMPARATIVE LEGISLATION (1930) 244; and of OPPENHEIMER, 1 NUSSBAUM 316.

award was available in Germany, or whether it had been supplanted by a more summary method of procedure, should be of no concern, for this is a matter of procedure regarding which the law of the forum controls. "I submit," says Kahn,⁹⁰ "that this legal rule of an implied promise to perform an award is not, or at any rate not solely, an institute of English substantive law, but one which is equally adjective law or law of procedure. That the view taken above is correct becomes very clear when one considers the nature of a contract implied by English law to satisfy a foreign judgment. If the quasi-contract were substantive law, then inquiries would have to be made whether the foreign law also implied a quasi-contract. These inquiries cannot be made because they would be against the purpose of this rule of law. Therefore, the right inference to be drawn is that in the case of a foreign judgment the implied quasi-contract is part of the law of remedies, and in the case of an implied contract to perform an award, the conclusion cannot be different from the above general reasons."

The entire approach under the German law is from the standpoint of supplying a remedy to enforce the award. The order of enforcement required to render local awards executory is no more than the simple English decree for leave to enforce an award, and does not transform the award into a judgment any more than does the English leave to enforce, and its purpose is purely for local execution of the award. It follows that an enforcement order of the foreign country should not be required and if it should have been made, it should have no effect upon proceedings in an English court.⁹¹ This conclusion would appear to be inescapable where the enforcement order is pro-

90. *Supra* note 89, at 245. "It cannot be denied that an enforcement order of a foreign country in respect of a foreign award may seem to save an English judge the very difficult task of examining a foreign award from the point of view of the foreign law; but what if the foreign enforcement order is only a clerical one without entering into the merits as in Belgium (CODE CIV. PROC. art. 1020) or a litigious one but not on the merits, as in Germany?" KAHN, *op. cit. supra* note 89 at 247.

91. In *Bremer Oeltransport v. Drewry*, [1933] 1 K. B. 753, an agreement had been made in England for arbitration in Germany. In an action to enforce the German award against a defendant domiciled in France, the question was whether the suit was for a breach of contract "made within the jurisdiction," in order that service of the summons out of the jurisdiction might be allowed under the Rules of the Supreme Court. The Court of Appeal concluded that "the greater weight of authority is in favor of the view that in an action on the award the action is really founded on the agreement to submit the differences of which the award is the result." The court left open the question whether "an action may or may not be brought on any implied contract on the award itself." Does not the action rest upon both the submission agreement and the award?

cedural in character and not a condition precedent to the binding character of the award itself.

Awards rendered in the United States would not generally encounter in England the difficulties of the *Merrifield* case since the action upon the award is available for enforcement of local awards in most states. There might be some difficulty in case of statutory awards rendered in a state which permits only statutory methods of enforcement under statutory submission agreements. Here the English courts would doubtless require a local confirming judgment before enforcing the award.

Owing to a scarcity of decisions in England regarding the enforcement of foreign awards, little can be said concerning other conditions that must exist before such awards will be enforced and the defenses that may be available. This dearth of authority is due perhaps to the fact that arbitration is so ancient and well developed an institution in England that most arbitrations which had any connection with England were held in England. If the ordinary common law action is permitted in the same manner as where a local award is being sued upon, the merits of the award will not be re-examined, but the court will go into questions of the validity of the arbitration agreement, the competency of the arbitrators, the regularity of the arbitral proceedings and other questions affecting the validity of the award. These questions are determined with reference to the law governing the arbitration and award. Thus in *Bankers and Shippers Insurance Co. of New York v. Liverpool Marine and General Insurance Co.*,⁹² the House of Lords refused to enforce a New York award on the ground that the arbitration proceeding was not held in accordance with the New York law.

Even the question whether a defense may be set up in an action on the award or can be availed of only by motion to set aside the award has been held to be controlled by the law governing the award. Thus in a suit in India upon an English award, the failure on the part of the defendant to receive notice that the arbitrator was proceeding to arbitration was not allowed as a defense, as it constituted merely an irregularity in arriving at the award, which cannot be set up under English law as a defense to an action upon the award, but is available only as a ground for a motion to set aside or remit the award. Such a motion, the court held, could be made only in England, a foreign court having no jurisdiction to set aside an English award.⁹³

92. 24 Lloyd's List Law Rep. 85 (H. L. 1926).

93. *Oppenheim & Co. v. Mahomed Haneef*, [1922] 1 A. C. 482.

B. Enforcement of Foreign Awards in the United States

Although the legal aspects of commercial arbitration in the United States are imperfectly developed and there are numerous differences to give rise to conflicts and litigation, there is a great scarcity of decisions regarding the enforcement of foreign arbitral awards.

Enforcement of Awards of Sister States. Since an action upon an award is an ordinary common law action upon a contract, such action should generally be available to enforce a foreign award, and in the few cases where suit has been brought upon a foreign award, this was the remedy used. There appear to be no cases where any attempt was made to enforce a foreign award by the summary statutory method at the forum. This is due to the fact, no doubt, that the statutory method for the enforcement of awards under the older types of statutes appeared to be limited to local awards. This was particularly the case under statutes requiring a stipulation that the award be confirmed by a specified court of the state, for in this instance it would be impossible for the foreign award to qualify. As regards the more liberal statutes, such as that of New York, there would appear to be no formalities with which a foreign award could not comply, and it might be argued that the matter is one of remedy or procedure to which the *lex fori* applies. However, the provisions will probably be interpreted as referring only to local awards. There would then remain only common law methods for the enforcement of foreign awards and the question is whether these are available in fact.

The extended controversies in continental countries as to whether the award should be regarded as a contract or as a judgment for purposes of enforcement would seem to have little, if any, significance in this country where the award itself without confirming judgment is concerned. As regards awards rendered in sister states, no suggestion has ever been made that they are judgments and as such entitled to full faith and credit.

Where a judgment has been rendered in the home state on an award or some court action has been taken there to render the award executory, the question is what its effect will be upon its enforcement in another state. Judgments rendered in an action upon a common law award in a sister state, it seems clear, are entitled to full faith and credit under the Constitution of the United States. In *Fauntleroy v. Lum*,⁹⁴ the Supreme Court of the United States held that the courts of Mississippi were

94. 210 U. S. 230 (1908).

bound to enforce a judgment rendered in Missouri, although the transactions out of which the award arose had occurred in Mississippi, where they were criminal offenses. The courts cannot decline the enforcement of a judgment of a sister state upon an award, therefore, on the ground that such enforcement would be contrary to the public policy of the forum. The same conclusion will probably be reached where a judgment or order is entered confirming a statutory award in a sister state according to the summary statutory method, in view of the fact that in most states the proceedings to confirm give to the defendant due notice and an opportunity to be heard, so as to satisfy the due process requirements, and the judgment entered upon the award appears locally to be regarded as final and conclusive as judgments in ordinary civil actions.

A closely associated question is whether the confirming judgment *must* be obtained in the state of the award in order to render a statutory award enforceable elsewhere. As there is some difference of view among the decisions regarding the enforceability of statutory awards by common law methods, the situation might arise where a statutory award, enforceable at plaintiff's election by a common law action in the state of the award, is sought to be so enforced in a state in which statutory awards are enforceable exclusively by the statutory method. In such a case the plaintiff would probably be required to obtain a confirming judgment in the state of the award and sue in the second state on the judgment. The mode by which a foreign award is to be enforced being a procedural matter governed by the law of the forum, a state not allowing a common law action upon a statutory award would probably not allow it with respect to a foreign award.

Under the statutes in this country an award probably becomes so merged in the confirming judgment, as to preclude further action upon the award.⁹⁵ If differences of view regarding the merger of the award in the judgment should arise, the question would in all probability be determined with reference to the law of the state in which the award and judgment were rendered.

Enforcement of Awards of Foreign Countries. Foreign judgments are enforced in this country by an action on the judgment, and not by any summary process. The fact that an award may be regarded in the home country as a judgment is therefore of no consequence so far as the procedure of enforcement in this country is concerned. Nor would the labeling of the award either as a judgment or a contract decide the question as to how far the courts will go into the merits of the case.

95. See STURGES, *op. cit.* *supra* note 4, at 11.

Whatever the award is called, it is admittedly effective to the extent of precluding review of the merits. One possible effect of such nomenclature might be that the courts subscribing to the reciprocity doctrine⁹⁶ with respect to judgments of foreign countries would carry over that doctrine to the enforcement of foreign awards. There is no valid reason, however, why this should be done. The reciprocity doctrine is defensible only from a political point of view and is entirely out of place in the enforcement of foreign awards, which rest primarily upon the agreement of the parties.

No doubt, the effect of court proceedings following an award in a foreign country may vary a great deal. In countries in which the award is not complete until it is confirmed by an order of the court or until it is declared executory, the award becomes converted into a judgment by such order or declaration, and its enforcement elsewhere may well be made to depend upon the principles relating to the enforcement of foreign judgments. It would seem equally clear, with respect to awards of countries which enforce awards by a simplified procedure without hearing the losing party, that an order for enforcement should not be regarded as having the effect of converting the award into a judgment. Difficulty exists, however, in those cases in which an enforcement order is granted only after an opportunity to be heard has been given to the losing party. Should the enforcement order in such a case be regarded as supplanting the award, so that if suit is brought in another country it should be for the enforcement of a foreign judgment? Locally, the enforcement order may have the effect of allowing execution on the award and no other. In such case it would seem that in an action in a foreign country the enforcement order should be ignored as a procedural matter and the award enforced as if there were no such order. Even if it should appear that under the local law the enforcement order was regarded as superseding or merging the award, it might be argued that as long as our courts do not apply the merger doctrine to judgments of foreign countries, they should not apply it to foreign awards. Upon this line of reasoning suit upon the foreign award might be allowed even in our federal courts without proof of existing reciprocity.⁹⁷

There are no decisions in this country regarding the question

96. *Hilton v. Guyot*, 159 U. S. 113 (1895).

97. The question of merger may likewise become important in case an award rendered and confirmed by a judgment in a state in this country is sought to be enforced abroad. If the award is regarded as being merged in the judgment, it may be a serious handicap to obtaining any remedy if defendant can be reached only in a country where the reciprocity doctrine as to enforcement of foreign judgments obtains.

whether the exequatur proceeding, or any other proceeding required to render the award executory in the home state is a prerequisite to enforcement of the award in this country. In England there is the *Merrifield* case,⁹⁸ holding that the necessity of exequatur proceedings before such award could be enforced in England should be determined by the law of the place where the award was rendered. This case, however, failed to inquire whether the requirement of an exequatur proceeding by the foreign law was not merely a local procedural one, which should be ignored in the enforcement of the award elsewhere.

A decision of the Court of Appeals of Georgia has held,⁹⁹ where the parties provided for arbitration under the English Arbitration Act, that the English award could not be enforced in Georgia as a common-law award for the reason that the parties had agreed upon a statutory award. As such foreign award could not be treated as a statutory award within the purview of the Georgia Civil Code, which applies only to local awards, the English award would be enforceable in Georgia only if it had been converted into a judgment. The conclusion drawn by the learned court from the agreement of the parties, would appear to be unjustified. An award under the English Arbitration Act need not be enforced by the statutory method in England but may be enforced by an action on the award.¹⁰⁰ There exists no sufficient reason, therefore, why the award could not be enforced as a common-law award in Georgia.

Defenses to Enforcement of Foreign Awards. In a recent case decided by the Court of Appeals of Ohio¹⁰¹ an agreement providing for future arbitration was made between a resident of Ohio and a resident of New York. The contract stipulated, "The provision of this contract relating to arbitration shall be construed according to the laws of the state of New York." The defendant having refused to abide by this agreement to submit to arbitration, an award was rendered in New York in favor of plaintiff in accordance with the New York statute, and suit was brought upon the award in Ohio. The defendant pleaded that the arbitration clause in the contract was void under the laws of Ohio as ousting the jurisdiction of the courts. Agreeing with the defendant's contention, the learned court held that arbitration agreements under the New York arbitration statute related to the remedy and, since the remedy must be governed by

98. 105 L. T. 97 (Ct. App. Ch. Div. 1911).

99. *Wright, Graham & Co. v. Hammond*, 41 Ga. App. 738, 154 S. E. 649 (1930).

100. RUSSELL, *op. cit. supra* note 8, at 276-277.

101. *Shafer v. Metro-Goldwyn-Mayer Distributing Corp.*, 36 Ohio App. 31, 172 N. E. 689 (1929).

the *lex fori*, which here was Ohio, only Ohio law could apply. As at the time of the decision Ohio did not have an arbitration act making agreements for the arbitration of future disputes irrevocable, the defendant was privileged under the local law of Ohio to revoke the submission agreement before the award was made. The defendant's refusal to proceed to arbitration was held to be a revocation of the submission agreement. According to the reasoning of this court no foreign award would be enforced in a state not having a modern arbitration act, where it appears that the defendant had revoked the authority of the arbitrators prior to the rendering of the award.

In *Gilbert v. Burnstine*,¹⁰² the defendants, residents of New York, contracted to sell and deliver certain goods to plaintiff in New York. A clause in the contract provided that differences should be arbitrated at London, pursuant to the arbitration law of Great Britain. Disputes arose and plaintiff commenced arbitration proceedings in London, mailing due notice to defendants in New York, according to the English Arbitration Act, advising defendants that on failure to concur in the appointment of an arbitrator, plaintiff intended to apply to the High Court of Justice of England for appointment of an arbitrator. Defendants ignored the notice and, upon application by plaintiff, an arbitrator was appointed by the court. Notice of the originating summons for appointment by the court of an arbitrator and notice of the arbitration proceedings were served on each of the defendants in New York, according to the English Arbitration Act. The defendants ignored the notice and the arbitration hearing was held without their presence. An award was rendered in favor of the plaintiff and he brought action upon it in New York. The defendants contended that the contract provision contemplated merely an agreement to arbitrate in England, involving no submission to the sovereignty of England and that, in the absence of personal service of process or voluntary appearance, the English arbitral tribunal had, therefore, no jurisdiction to render the award. The Supreme Court¹⁰³ and the Appellate Division of the Supreme Court¹⁰⁴ accepted the defendant's contention and dismissed the complaint. The Court of Appeals reversed the decisions of the lower courts on the ground that the express provisions in the contract that the arbitration should be held in England and should be pursuant to the English Arbitration statute constituted "an implied submission to the terms of the act itself, and to any rules or procedural

102. 255 N. Y. 348, 174 N. E. 706 (1931).

103. 135 Misc. 305, 237 N. Y. Supp. 171 (Sup. Ct. 1929).

104. 229 App. Div. 170, 241 N. Y. Supp. 54 (1st Dep't, 1930).

machinery adopted by competent authority in aid of its provisions." ¹⁰⁵

This decision is of great importance from the standpoint of the enforcement of awards rendered in foreign countries. Prior thereto it seemed that an American who had expressly agreed to submit to arbitration in a foreign country could defeat the agreement by merely staying away from such country, thereby rendering personal service in such country impossible. Under *Gilbert v. Burnstine* this mode of escape from contractual obligations will not be available where the agreement specifically provides for arbitration in a foreign country and pursuant to its laws, and the law of the foreign country allows service of process without the jurisdiction. Under such circumstances the defendant when sued upon the award in this country cannot resist its enforcement on the ground that the award was rendered without personal jurisdiction over him.¹⁰⁶

105. 255 N. Y. 348, 174 N. E. 706 (1931). The Court of Appeals made no reference in its opinion to the case of *Skandinaviska Granit Aktiebolaget v. Weiss*, 266 App. Div. 56, 234 N. Y. Supp. 202 (2d Dep't, 1929), cited by the Second Department of the Appellate Division. In this case plaintiff, a Swedish corporation, and the defendant, a citizen of the United States and a resident of New York, made a contract in Sweden providing that any dispute arising in reference to the performance of the contract was to be settled by arbitration and without appeal. The defendant instituted arbitration proceedings in Sweden, which were later abandoned. Thereafter another dispute arose and plaintiff subsequently demanded arbitration and appointed its arbitrator pursuant to the agreement and Swedish law. Notice to this effect was served upon the defendant in Brooklyn, New York, demanding that the defendant select an arbitrator. The defendant having failed to do so, the Administrator of Justice of the Swedish Government appointed an arbitrator to act on defendant's behalf. The arbitrators proceeded and reported their findings in accordance with Swedish law. Judgment was entered in accordance with this report by the Court of the Administrator of Justice at Gothenburg, Sweden. The arbitration proceedings and notice thereof, the agreement and the arbitration clause therein, complied with the laws of Sweden. In an action upon the Swedish judgment in New York, judgment was given for the defendant on the ground that the court of Sweden had not acquired jurisdiction in personam over the defendant.

The case was followed in *Matter of United Artists Corp. v. Gottesman*, 135 Misc. 92, 236 N. Y. Supp. 623 (Sup. Ct. 1929).

The facts in the *Weiss* case differ, of course, materially from those in *Gilbert v. Burnstine*, for there was in that case no express agreement for arbitration in Sweden and pursuant to the Swedish law. Again, the action was on a Swedish judgment and not on a Swedish award, as was the case in *Gilbert v. Burnstine*. On the other hand, the defendant himself had instituted arbitration proceedings in Sweden in connection with the same contract.

106. See also *Sturges & Burn Mfg. Co. v. Unit Construction Co.*, 207 Ill. App. 74 (1917); *Mitsubishi Goshi Kaisha, Inc. v. Carstens Packing Co.*, 116 Wash. 630, 200 Pac. 327 (1921).

In its opinion the learned Court says: "The case involves no more than this, whether staying out of the arbitration, they are bound by an award, made after due compliance with the requirements of the procedural machinery established by the British statute, unless they are able to show that no contract has been made or broken."¹⁰⁷ The question whether the defendant has entered into an arbitration agreement and defaulted thereon apparently can be put in issue in New York in a suit upon a foreign award.¹⁰⁸

That the defense of "public policy" is available with respect to awards of foreign countries goes without saying. In that connection the learned court in *Gilbert v. Burnstine* says: "The serious problem is whether the proceedings were in fact conducted according to the English statute as interpreted by the English courts. . . . After evidence of the facts has been produced, then it will be timely for the court to determine . . . whether the English Arbitration Act taken in connection with the foreign rules of procedure, conforms or conflicts with our public policy."¹⁰⁹

There are no cases throwing a clear light upon any other defense that may be set up in an action upon the award of a foreign country. If the award has been converted into a judgment in the home state and suit is upon such judgment, the ordinary rules applicable to judgments of sister states and

107. 255 N. Y. 348, 358, 174 N. E. 706, 709 (1931).

108. *Finsilver, Still & Moss v. Goldberg, M. & Co.*, 253 N. Y. 382, 171 N. E. 579 (1930), (holding that upon this issue the parties are entitled to a jury trial).

109. 255 N. Y. 348, 357, 174 N. E. 706, 708 (1931).

An interesting case came before the First Department of the Appellate Division in New York. The parties had agreed to submit to arbitration in New York disputes arising out of a contract. Personal service is expressly required by the New York Act for any application for an order directing that arbitration proceed. (New York Arb. Act 1920, Sec. 3). The defendant, a Maine corporation which was not doing business in New York, refused to arbitrate, whereupon the plaintiff served upon the defendant's treasurer, who was found in New York, a notice of motion for an order directing that arbitration proceed. Appearing specially, the defendant contended that the Court had not acquired jurisdiction over it because there was no valid service of process on it according to the statute. The Court held that the arbitration provision in the contract amounted to prior consent to the jurisdiction of the New York courts and granted the motion. One of the judges dissented on the ground that the defendant had consented to the jurisdiction of New York only if acquired in accordance with the terms of the arbitration law, which was not the case here, since the defendant was not doing business in New York and personal service required by the statute could not therefore be validly made. *Matter of Heyman Inc. v. Cole*, 242 App. Div. 362, 275 N. Y. Supp. 23 (1st Dep't, 1934). See Note (1935) 20 CORN. L. Q. 369.

those relating to judgments of foreign countries should govern.

If we stop for a moment to take a general inventory of the results so far obtained, it must be admitted that the outlook of commercial arbitration from the standpoint of its international and interstate enforcement by legal process is gloomy indeed. The widest differences of view exist in the first place regarding the validity of agreements for the submission of future disputes to arbitration and the governing law from the standpoint of the conflict of laws. Then there exists the greatest diversity of rules regarding the constitution of the arbitral courts and the detailed steps in the arbitral proceedings. Great uncertainty exists also in many countries regarding the relationship existing between the ordinary courts and the arbitral procedure, which makes the process full of hazards, possible delays, and unexpected expense. Where the award has to be enforced in another country, additional difficulties arise. Thus in countries in which foreign awards are placed on the same footing as foreign judgments the requirement of reciprocity will generally prevent the enforcement of foreign awards. In order to escape this conclusion it is often insisted—and the view is accepted in a number of countries—that an award is in its essence a contract instead of a judgment. New difficulties arise, however, when the award has been rendered enforceable by being made executory in the country in which it was made. As a judicial decree is necessary for the purpose, the question is whether the award has been converted thereby into a judgment, so as to become subject to the reciprocity requirement. Even if this is denied, the enforcement of the foreign award may be resisted on the greatest variety of grounds. These defenses may have reference to the validity of the submission agreement, to the proper constitution of the arbitral court, to the arbitral proceedings, or to the formal validity of the award itself. Much diversity exists in these regards in the local legislation of the different countries and the rules of the conflict of laws relating thereto are anything but settled. Where both parties have not participated in the proceedings leading to the award, enforcement may easily be refused on the ground of lack of jurisdiction or lack of proper notice, absence of which will render the enforcement of the award contrary to the public policy of the forum. Nor does the unsatisfactory nature of the international situation stop here, for, even if no objection of a substantive character to the enforcement of a foreign award exists from the standpoint of the law of the forum, there may be no summary procedure available there, so that the delay and cost of the enforcement proceedings may deprive the successful party of any

advantage that the agreement for arbitration was intended to confer.

III

ENFORCEMENT OF FOREIGN AWARDS UNDER THE GENEVA CONVENTION OF SEPTEMBER 26, 1927, FOR THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ¹¹⁰

The Geneva Protocol on Arbitration Clauses, of September 24, 1923, sought to improve upon this chaotic condition by providing for the compulsory recognition of arbitration agreements as between the contracting states. No agreement could be had, however, upon the question what law should govern the validity of agreements for arbitration. The application of the Protocol is limited to parties of different contracting states and does not include agreements between nationals of one contracting state for arbitration in some other contracting state. Suits brought contrary to the terms of an agreement for arbitration governed by the Protocol are to be stayed and the parties are to be referred to the decision of the arbitral court, except in the case where the arbitration cannot proceed or has become inoperative. As, according to the provisions of the Protocol, the awards are entitled to compulsory enforcement only in the state where rendered, and all other contracting states are under a duty to stay any action brought in violation of the submission agreement, the successful party in the arbitration would be without any remedy if the award could not be satisfied by execution in the country in which it was rendered, and the award as such was not enforceable in the state in which the defeated party lives or has property. The provisions of the Protocol of 1923 made an international convention for the enforcement of foreign awards, therefore, an absolute necessity.

As the Geneva Convention for the Enforcement of Foreign Arbitral Awards of September 26, 1927, was to supplement the Protocol of 1923, the adoption of the Protocol is made a prerequisite to becoming a party to the Convention. Adherence to the Convention, however, constitutes adherence to the Protocol. The Convention extends only to submission agreements falling within the Protocol, which applies to agreements between parties of different contracting states, but not to submission agreements between nationals of the same contracting state for arbitration in some other contracting state.

Under the Convention the contracting states are to enforce

110. For the text of the convention, see 2 NUSSBAUM 237 et seq.

awards falling within the Convention, in accordance with the procedure of the forum, if (1) the award was rendered pursuant to an arbitration agreement valid under the law applicable to the agreement, (2) the arbitral tribunal and the constituency thereof conformed with the arbitration agreement and the rules of law applicable to the arbitration proceedings, (3) the award has become definitive at the place of rendition, but it will not be so considered if it is subject to attack by the "ordinary" legal means or proceedings to annul it are then pending in the home country, (4) the object of the award is susceptible to settlement by arbitration under the law of the forum, and (5) the recognition or enforcement of the award would not contravene the public policy of the forum. Even though these conditions have been met, the enforcement of the award may, according to Article 2, still be refused if (1) the award has been annulled in the country where it was rendered, (2) the party against whom the award has been invoked did not have notice of the arbitration proceedings nor an opportunity to be heard, or, if he be under legal disability, was not regularly represented, or (3) the award passes on a controversy not included within the terms of the arbitration agreement or contains decisions which go beyond the terms of the agreement.¹¹¹ The Convention does not specify that the conditions laid down in Article 2 must be proved by the defendant but leaves to the law of the state in which enforcement is sought the question whether the court may consider them *ex officio*.¹¹²

An award may be subject to impeachment in some countries on grounds other than those specified in Articles 1 and 2 of the Convention, for example, because of irregularity in the procedure, perjury, forgery, and the like. If the defendant establishes that such a ground exists under the law applicable to the arbitral proceeding, the judge, who may not be prepared to deal with questions closely connected with the peculiarities of procedure in a foreign country, is privileged under the terms of the Convention either to suspend the proceedings for enforcement, giving the party a reasonable time to have the award set aside in the country in which it was rendered, or else, if he is not allowed to suspend the proceedings under his law, to refuse enforcement.¹¹³

The party seeking enforcement of a foreign award must furnish (1) the original of the award or a copy authenticated according to the legislation of the country where it was rendered, (2) the papers and documents proving that the award

111. See 2 NUSSBAUM 238.

112. 2 NUSSBAUM 243.

113. Art. 3, 2 NUSSBAUM 244.

has become definitive in the country where rendered, and, if there be occasion, (3) the papers and documents to establish that the conditions for recognition required by Article 1 (a and c)¹¹⁴ have been fulfilled.

Since the provisions of the Convention are in many respects less favorable than the legislation of several countries and the provisions of bilateral treaties existing between some of the countries, Article 5 of the Convention provides that no interested party shall be deprived of the right to avail himself of an arbitral award in the manner and measure admitted by the legislation or treaty of the country wherein enforcement of the award is sought.

The Convention does not authorize the re-examination of the merits of the award, not even for the purpose of determining whether the enforcement of the award would be against the public policy of the forum.¹¹⁵

The Geneva Convention for the Enforcement of Foreign Awards, of 1927, has been put substantially into effect in England by the Arbitration (Foreign Awards) Act of 1930.¹¹⁶ It is likewise in force in North Ireland and in many continental countries.¹¹⁷ So far as the United States is concerned, the law of commercial arbitration has not yet reached that stage of legal development that adherence to any international convention, however excellent, would be possible. In many states arbitration is still limited to existing controversies. In the states having acts authorizing arbitration of future disputes, the legislation has generally in view only local arbitration and is not fully adjusted to the enforcement of agreements for commercial arbitration in some other state or country, or to the enforcement of foreign awards. The summary method allowed for enforcing awards appears to be limited to local awards, and is not extended even to awards of sister states. A more liberal attitude on the part of our courts with reference to arbitration in general, and with reference to arbitration by citizens of the forum in other states or foreign countries in particular, is necessary before adherence to an international convention is practicable. A progressive step in the direction of facilitating interstate and international commercial arbitration was taken by the New York Court of Appeals in *Gilbert v. Burnstine*,¹¹⁸ which will

114. Art. 4, 2 NUSSBAUM 238. The substance of subdivisions (a) and (c) of the Convention has been given under (1) and (2) in the text.

115. Volkmar, *Das Genfer Abkommen über die Vollstreckung ausländischer Schiedssprüche vom 26 September 1927*, 2 NUSSBAUM 136-137.

116. See *supra* note 86.

117. See 4 NUSSBAUM 14-16.

118. 255 N. Y. 348, 174 N. E. 706 (1931).

prevent parties to arbitration agreements from defeating them by the simple expedient of staying away from the jurisdiction in which the arbitration is to take place, provided the law of the different states or countries permits the judicial appointment of arbitrators and judgments on the award without personal service within the state or country but upon proper notice to the recalcitrant party, when such party has expressly or impliedly authorized such procedure. Consent to the exercise of jurisdiction would thus enable states and countries sanctioning *ex parte* awards to render awards which would be enforceable under the doctrine laid down in *Gilbert v. Burnstine*.

Apart from the practical difficulties which adherence to any international convention dealing with a procedural subject would present from the standpoint of the United States,¹¹⁹ serious doubt may be entertained regarding the advantages of an international convention relating to arbitration at the present time. Whatever may be the ultimate solution of the problem, it is clear from the provisions of the Geneva Protocol on Arbitration Clauses of 1923, and of the Convention for the Enforcement of Foreign Arbitral Awards of 1927, that any attempt to deal with the subject of commercial arbitration internationally at the present moment is premature. The divergencies existing between the different countries, as regards legislation, business practises relating to arbitration, and the relation between arbitration and the courts are so great, as to make any general convention for the enforcement of foreign awards by legal process impracticable. Because of these differences it was found necessary to restrict the application of the Geneva Convention of 1927 to awards rendered on the basis of the Geneva Protocol of 1923. For similar reasons some of the most important provisions relating to the enforcement of foreign awards are either gone over in silence in the Convention or left exceedingly vague. Thus, there is nothing in the Convention concerning the vexed problem of the effect of the exercise of judicial control over awards, for no formula acceptable to all could be found.¹²⁰ Like the earlier Protocol, the Convention of 1927 fails to state by what law the validity of the arbitration agreement is to be determined. The German Government proposed a specific provision in this regard, but no agreement was possible and the matter was referred to the Hague Conference on Private International Law.¹²¹ Nor could agreement be had

119. See Chamberlain, *International Commercial Arbitrations from an American Viewpoint* (1930) 36 INTERNATIONAL LAW ASSOCIATION 493, 496 et seq.

120. 2 NUSSBAUM 242.

121. 2 NUSSBAUM 251.

regarding the question where an award made by correspondence should be deemed made. In view of the great diversity in the laws of the different countries with respect to the question when an award has become "definitive," no greater precision could be given to this condition, than its formulation in the Convention. Regarding the question whether a foreign award can be impeached on account of corruption, bias or misconduct on the part of an arbitrator, or on account of irregularities in the procedure, the Convention contains nothing beyond the general provision that if the award is subject to impeachment in the state in which it was rendered, a foreign judge may decline to enforce it, or may give to the defendant a reasonable time in which to have the award vacated in the foreign state.¹²² In the event that the foreign award is not subject to impeachment in the state in which it was made, enforcement may be denied under the Convention, if such enforcement would be contrary to the public policy of the forum. The Geneva Convention does not specify what is meant by public policy and thus gives to each state entire freedom to apply its own notions.¹²³ It was recognized, of course, that an international convention was unable to lay down general rules for the arbitral proceeding itself, which must be adjusted of necessity to the law of each state; such rules can be provided only, and with difficulty, by bilateral treaties. No attempt was made either to regulate the procedure by which the foreign award is to be enforced. The question whether it will be enforced by an action on the award, or by a formal exequatur, or by the summary procedure applicable to local awards, continues to depend therefore upon the law of the state in which the proceeding is pending.

All this goes to show that the time is not ripe for the promotion of international arbitration in commercial matters by means of multi-lateral treaties. The best means available to that end at present would appear to be bilateral treaties between countries having the same procedural background; and such treaties have been entered into between a number of countries. As between countries having widely different legal institutions or modes of procedure, useful results would seem to be obtainable only if the treaty includes also the rules for the arbitral procedure.¹²⁴

Resort to legal compulsion in commercial arbitration fre-

122. Art. 3, 2 NUSSBAUM 238.

123. See *Hornby, Hemelryk & Co. v. Spinnerei und Weberei—Firma X*, 15 *Hans. Rechts und Gerichtszeitschrift* 786; OGH (Supreme Court, Austria), June 16, 1931, 4 NUSSBAUM 125.

124. Such a treaty was entered into between Germany and Russia in 1925.

quently produces unsatisfactory results, even when local arbitration is involved. This is true even of the English experience with arbitration, notwithstanding the fact that its system of arbitration is generally regarded as unsurpassed by that of any other country of the world. According to an English observer arbitration has been found mutually advantageous in England only "where (1) privacy, or (2) rapidity are essential, or (3) where the dispute involves simply a pure question of fact or technical opinion, such, for example, as whether goods are merchantable or up to sample, or whether a given piece of machinery will function."¹²⁵ Privacy can be secured in England only if the parties accept the arbitrator's award as conclusive, and awards can be made expeditious only if both parties desire it. Economy has been obtained in England only in the simpler cases.¹²⁶ Commercial arbitration is successful when conducted informally by arbitrators under institutions of high standing, whose rules governing the various steps in the proceedings are definite and conform to the law and custom of the country where the arbitration takes place, and when an experienced and responsible administrative agency is charged with the duty of interpreting such rules and putting them into effect. In the absence of such conditions, commercial arbitration is generally unsatisfactory. The best mode of promoting effective international commercial arbitration would thus appear to be through a development of such institutions throughout the world, and the preparation of standard rules and standard arbitration clauses with a view to their maximum efficiency in the various countries, and the enforcement of awards at the domicile of the parties. Owing to different views in the mercantile world and divergent interests of the various countries, real progress in international commercial arbitration can be expected, however, only if some permanent international agency charged with the duty of fostering arbitration is set up. The creation of the Inter-American Commercial Arbitration Commission by the Pan-American Union, pursuant to a resolution adopted by the Seventh International Conference of American States, for the purpose of establishing an Inter-American system of arbitration, constitutes, therefore, a significant event in the history of arbitration. A similar body created under the auspices of the League of Nations might render the same kind of service for the rest of the world. So far as legal compulsion is necessary with respect to recalcitrant parties, effective international legal control will be difficult—and

125. Nordon, *British Experience with Arbitration* (1925) 83 U. OF PA. L. REV. 314, 323.

126. *Id.* at 323.

probably impossible—of attainment, in view of the divergencies in the existing laws and procedures of the different countries. The attempt by the League of Nations to further the cause of international arbitration in commercial affairs by means of a multi-lateral convention was therefore ill-conceived. The International Conference of American States at its meeting in Montevideo proceeded along more practical lines, when it attacked the problem of Inter-American Commercial Arbitration from an administrative side by causing standard rules and a standard arbitration clause to be formulated for inter-American contracts and by providing the necessary machinery in the different countries for their enforcement.

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